2015-2016 Legal Issues Student Guide

Municipal Police Training Committee

Dan Zivkovich, Executive Director

Legal Issues TY2015-2016
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This document is intended to serve as a training guide for legal instructors to review new case law and legislation that has been issued from the controlling courts in Massachusetts, the Supreme Judicial Court and the Massachusetts Appeals Court over the course of the year. Some Supreme Court decisions are included in this curriculum. While this curriculum examines the impact of new cases or law by revisiting some past cases, it is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor. Additionally, please remember that many cases are fact specific and contain variations that make it difficult for the Courts to establish bright line rules for policing.

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Chapter 1

MOTOR VEHICLE LAW

I. Updates on OUI Cases:

HYPOTHETICAL: Defense attorney Johnny Smith has a boat named the *Always Innocent* that he docks in Boston Harbor. One evening he was on the board with a few friends and they were having a couple of drinks near Governors Island. One of Smith's friends jumped into the water and soon Smith and a few others followed. Smith's friend started the boat and reversed to pick up one of the passengers. As the boat was reversing, the propeller severed one of the passenger's arms. The Coast Guard responded along with local police. Johnny Smith was arrested and charged with reckless and drunken boating causing a serious injury operating a vessel. After Johnny was arraigned, information came out that Johnny was not the person who reversed the boat to pick up the passenger. Witnesses told police that Johnny was in the water when the accident happened. Johnny failed a breathalyzer test measuring at .09. Can Johnny Smith still be charged with OUI?

Answer: What are Johnny's options? This scenario is based on an incident that involved a defense attorney who owned the *Naut Guilty* in Boston Harbor. Although the defense attorney was not driving the boat when one of the passenger's arms was severed, police charged him with OUI because he exhibited signs of impairment when police responded.

Implied Consent and OUI Boating

Anyone charged with OUI boating who refuses the chemical test will have a 120 day loss of license.

Commonwealth v. Thompson, 87 Mass App. Ct., 572 (2015): The defendant struck a moored sailboat and the passenger was ejected and eventually died from her injuries. While the defendant was receiving treatment at the hospital for his injuries, one of the responding police officers asked if he would consent to giving a blood sample for chemical testing. During the recitation of the consent form, the officer mistakenly informed the defendant that his failure to submit to a chemical test would result in a 180 day loss of license rather than 120 day loss of license. The officer read from the consent form that applies to OUI for motor vehicles.

Under Massachusetts law, OUI while operating a vessel results in a 120 day loss of license and it does not contain a reciprocal provision of enhanced penalties that occur with OUI while operating a motor vehicle. Operators' licenses cannot be suspended for life for refusing to take chemical test when charged with OUI while operating a vessel.

Three hours after signing the form, the defendant's blood was taken and he was charged with OUI while operating a vessel under G.L. 90B §8A. The defendant filed a motion to suppress and argued that his consent to submit to a chemical test was involuntary because he had received inaccurate information with regard to the penalties for refusing to submit to the test.

The motion to suppress was allowed because the judge determined that the misinformation given to the defendant regarding the penalties was defective and coercive The Appeals Court heard the case.

Conclusion: The Appeals Court held that even though the warnings were defective, the constitutional standard does not apply in this case. Under Massachusetts implied consent allows a medical facility to administer chemical tests at the direction of law enforcement. A person does not have a constitutional right to refuse to submit to a blood test.

The facts of the record indicate that the defendant verbally agreed to undergo the blood test without objection. The testimony of the responding officer and the nurse testified suggest that the defendant was cooperative and willing to submit to test. When asked whether he would submit to chemical tests, the defendant stated "whatever you want and what you need to do is fine," and he even held out his arm for the nurse to take blood for the testing.

- **TRAINING TIP**: ***Thompson*** does not change the procedure police are following when asking a person whether they will submit to a chemical test. ***Thompson*** focused on whether the defendant's consent was voluntary when the police officer told him that a refusal to submit to a chemical test for this OUI boating will result in a 180 day loss of license rather than the 120 days. **NOTE:** The Office of Alcohol Testing is drafting an updated Statutory Rights and Consent Form related to OUI Boating.

In Massachusetts a person arrested for OUI can consent EITHER to a breath test at the police station or to a blood test at the hospital. The suspect can refuse to take either test.

- If suspect is injured and transported to the hospital, police can subpoena the records if the suspect does not consent to the blood test. The refusal of the blood test at the hospital is treated the same way as refusing breath test at the police station. The same rules apply to a person charged with OUI involving a boat as at motor vehicle.

If a defendant submits to blood tests during the course of medical treatment, the results of the tests are admissible. The SJC has held that results of blood tests are admissible and do not implicate the privilege against self-incrimination. M.G.L. c. 90, § 24(1)(e***); Commonwealth v. Brennan***, 386 Mass. 772, 776(1982).

Issues with Breathalyzer Testing

- **TRAINING TIP:** The issues with the breathalyzer tests are not as extensive as initially thought. The manufacturer of the solution is correcting the calibration.

The Breath Alcohol System falls under the Code of Massachusetts Regulations (CMR). These regulations have the same force and effect as laws even though they are created by the executive branches of government. These regulations state the guidelines for the Breath Alcohol Testing System. One of those guidelines involves proper calibration of the machine.

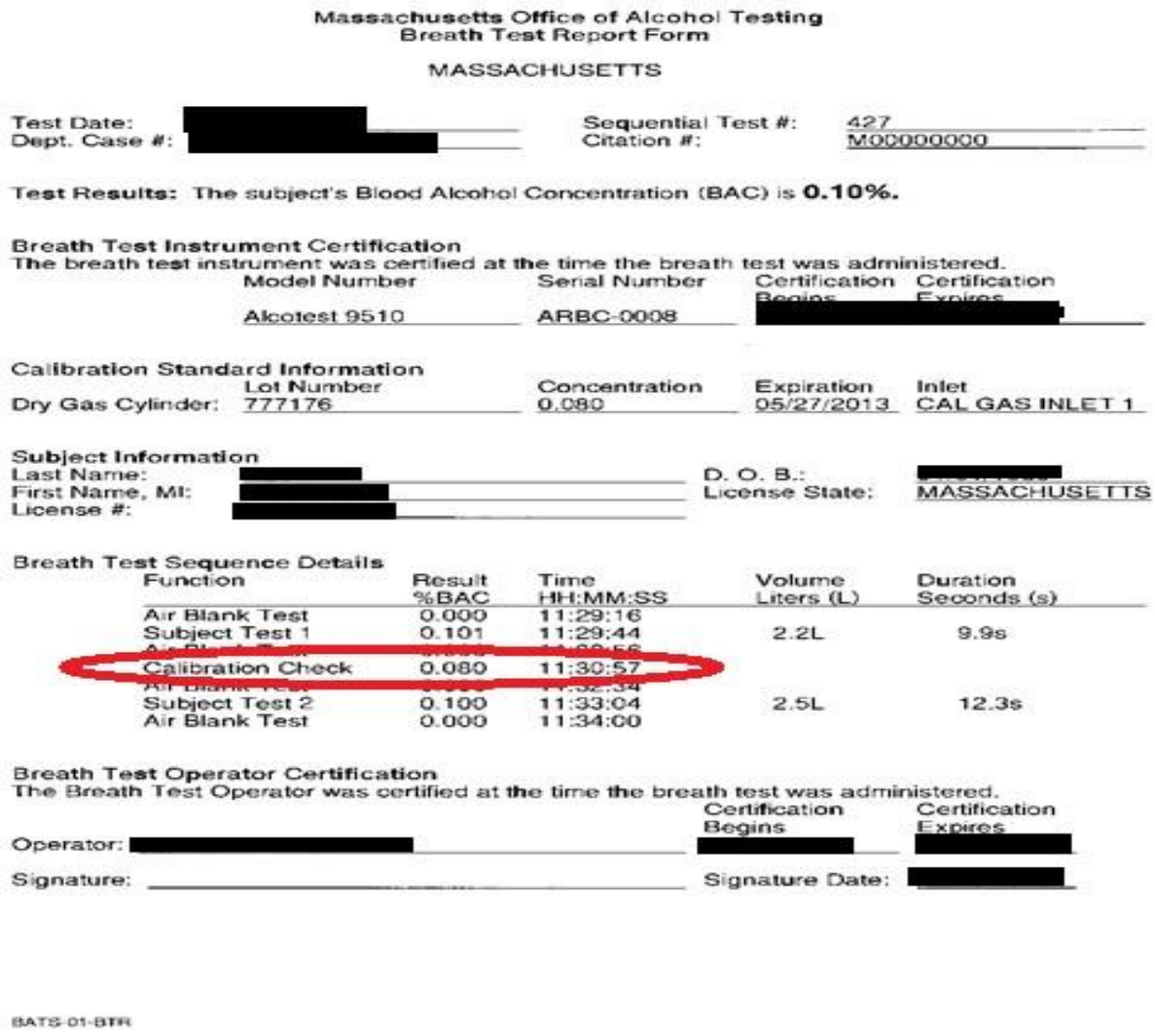
CMR 2.l l: Calibration Standards

(3) The gas calibration standard used as part of a valid Implied Consent Breath Test sequence shall be manufactured at an alcohol concentration of 0.080% ± .005%. The test shall be considered valid and the device operating properly if the result of the analysis of the gas calibration standard shows an alcohol concentration of 0.074% - 0.086%. The results shall be truncated to three decimal points.

Police Actions:

- Review the Breath Test Report Form (see example below) and make certain the calibration check is between **.074 - .086%.**
- If the test falls within that calibration then the test is valid for calibration purposes.
- If the calibration falls outside this range please place the machine *Out Of Service* and contact the Officer in Charge of the Breath Test Machines assigned to the Bureau of Field Services.
    - The charged individual should then be taken to a different location to perform the test using a Breath Test Machine that is properly functioning.

Please be aware of the **three hour rule** for conducting this test (***Colturi***).



Massachusetts Office of Alcohol Testing
Breath Test Report Form

MASSACHUSETTS

Test Date: [redacted] Sequential Test #: 427
Dept. Case #: [redacted] Citation #: M00000000

Test Results: The subject's Blood Alcohol Concentration (BAC) is **0.10%.**

Breath Test Instrument Certification
The breath test instrument was certified at the time the breath test was administered.

Model Number	Serial Number	Certification Begins	Certification Expires
Alcotest 9510	ARBC-0008	[redacted]	[redacted]

Calibration Standard Information

	Lot Number	Concentration	Expiration	Inlet
Dry Gas Cylinder:	777176	0.080	05/27/2013	CAL GAS INLET 1

Subject Information
Last Name: [redacted] D. O. B.: [redacted]
First Name, MI: [redacted] License State: MASSACHUSETTS
License #: [redacted]

Breath Test Sequence Details

Function	Result %BAC	Time HH:MM:SS	Volume Liters (L)	Duration Seconds (s)
Air Blank Test	0.000	11:29:16		
Subject Test 1	0.101	11:29:44	2.2L	9.9s
Calibration Check	0.080	11:30:57		
Subject Test 2	0.100	11:33:04	2.5L	12.3s
Air Blank Test	0.000	11:34:00		

Breath Test Operator Certification
The Breath Test Operator was certified at the time the breath test was administered.

Operator: [redacted] Certification Begins [redacted] Certification Expires [redacted]
Signature: _____ Signature Date: [redacted]

BATS-01-BTR

Commonwealth v. Camblin, 471 Mass. 639 (2015): The SJC held that the defendant, Kirk Camblin, is entitled to a Daubert-Lanigan hearing to address the reliability of the breathalyzer based on the questions with the source code and other issues, including whether the instrument tests exclusively for ethanol or whether the calibration system fails to adequately measure the reliability of the device.

The defendant in this case, along with sixty-one defendants involved in other OUI cases pending in the District Court, moved to exclude admission of breath test evidence derived from the use of a particular model of breathalyzer, the Alcotest 7110 MK III-C (Alcotest), on the basis that errors in the Alcotest's source code as well as other deficiencies rendered the breath test results produced by the Alcotest unreliable. The judge specially assigned to these cases denied the motion without a hearing, evidentiary or otherwise. The SJC found that since the breath test evidence, at its core, is scientific evidence, the reliability of the Alcotest breath test result had to be established before evidence of it could be admitted, see ***Commonwealth v.***

Lanigan, 419 Mass. 15, 25-26 (1994), and, in this case, a hearing on and substantive consideration of the defendant's challenges to that reliability were required.

- **TRAINING TIP:** The Office of Alcohol Testing discontinued using the Draeger Alcotest 7110 breath testing instrument in 2013 and replaced it with Alcotest 9510.

Difluoroethanem contained in computer aerosol cans is not considered "glue" under G. L. c. 94C, § 21 (OUI Drug)!

Commonwealth v. Sousa, 88 Mass. App. Ct., 47 (2015): Police were called after witnesses observed Manuel Sousa roll to a stop in the middle of an intersection. When the police officer arrived, he observed the defendant reclined in his seat behind the steering wheel, place an aerosol canister to his mouth and spray. The police officer ordered the defendant to turn off the engine and to get out of the vehicle. The defendant ignored the officer's command and he shifted the vehicle in drive. The police officer drew his weapon and ordered the defendant to put the vehicle in park. The defendant complied, although he did not appear to understand what the police officer asked him to do. The police officer retrieved two aerosol canisters from the vehicle which were computer cleaners. At trial the contents of the computer cans were the central issue for determining whether the defendant was operating a motor vehicle under the influence of drugs. The defendant claimed the contents of the computer cleaners were not included as a proscribed substance in G. L. c. 94C, § 1 and did not give police the power of arrest under G. L. c. 94C, § 21.

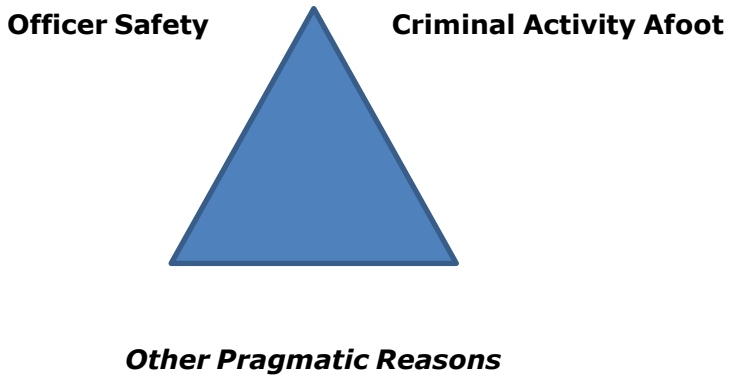
The Commonwealth argued that the computer cleaners contained difluoroethanem, a chemical equivalent of ethylene fluoride, and demonstrated that the defendant was driving under the influence of "vapors of glue." The Commonwealth contended that "it defies logic that the Legislature would afford police the authority to arrest a driver for operating under the influence of ethylene vapors, and identify such conduct as criminal under § 21, yet prohibit the prosecution thereof under § 24." Arguing that statutes should be read harmoniously, the Commonwealth asserts that operating under the influence of ethylene fluoride must also be a prosecutable offense under G.L. c. 90, § 24(1)(a)(1). The Court declined the Commonwealth's statutory argument that the Court should read two statutes together and it found that there was no evidence in the record that ethylene fluoride is equivalent to ethylene, the chemical listed in the motor vehicle power of arrest statute.

Lastly, the Commonwealth asked the Court to consider the website of the National Institute of Health which categorizes difluoroethanem, as a chemical equivalent of ethylene fluoride. The Court again determined that it could not accept the National Institute of Health website's definition. There was no evidence that difluoroethane, the chemical that was contained in the canister from which the defendant was inhaling, was the chemical equivalent of ethylene fluoride, or that either of those substances qualify as "glue" or any other prohibited substance defined in the statute. The Court vacated the OUI drugs conviction but upheld the conviction for negligent operation of motor vehicle.

- **TRAINING TIP**: Aside from addressing some of the issues with OUI drug cases, ***Sousa*** also reviews the elements for negligent operation of a motor vehicle.

II. Motor Vehicle Stops

Reasons for Exit Orders



Routine Traffic Stops and Exit Orders

Commonwealth v. Cruz, 945 N.E.2d 899 (2011): The SJC held that there are three bases upon which an exit order issued to a passenger in a validly stopped vehicle may be justified:

(i) an objectively reasonable concern for safety of the officer,

(ii) reasonable suspicion that the passenger is engaged in criminal activity, and

(iii) "pragmatic reasons."

As to the first, "it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns."

Commonwealth v. Gonsalves, 429 Mass. 658 (1999): In ***Gonsalves***, a trooper stopped a taxi driver after observing it drive in the breakdown lane. After obtaining the driver's license and registration, the trooper ordered the passenger out of the vehicle because he thought the passenger's behavior was unusual. The exit order in ***Gonsalves*** was not valid because "a passenger in a stopped vehicle may harbor a special concern about the officer's conduct because the passenger usually had nothing to do with the operation, or condition, of the vehicle which drew the officer's attention in the first place."

Officer Safety Concerns

The SJC held that a protective sweep of the interior of a motor vehicle was justified when considering the "totality of the circumstances," and the officer safety issue.

Commonwealth v. Douglas**,** 472 Mass. 439 (2015): Boston Police were patrolling the area outside of Felt night club in anticipation of a potential gang fight. Officer Liam Hawkins and

Officer Matthew Wosny observed the defendant Jason Douglas leave the Felt nightclub with Wayne Steed. Steed was holding his hand tightly to his body in the front pocket of his blue sweatshirt and Douglas was punching his hand. A female driving a Toyota Camry picked up Douglas and Steed. Boston police stopped the Camry when it failed to use a directional.

Officer Hawkins was familiar with Douglas and had interacted with him on more than fifty occasions through his work at the Youth Violence Strike Force. Douglas had a prior criminal record which included a firearms conviction and Johnson had a record of drug offenses and violent crimes. Douglas was sitting in the front passenger seat and Steed was in the backseat along with a man identified as Shakeem Johnson (hereinafter referred to as "Johnson"). Johnson had one arm stretched across the front of his torso near his waist and "he was kind of pivoted to the right and leaning in towards the middle of the vehicle." Based on Johnson's body position, Officer Wosny ordered him out of the vehicle and conducted a pat-frisk. Steed was also ordered out of the vehicle because his hands appeared to be clutching something on the outside of his sweatshirt pocket. Police did not recover anything on Steed or Johnson.

Douglas opened the door and got out of the vehicle. Officer Hawkins testified in his prior interactions with Douglas he was usually "calm and casual" but during the stop he seemed "different." Officer Hawkins called Douglas by his *first name* and ordered him to return to the vehicle. Douglas complied and when he returned to the vehicle, he shifted the vehicle from park into drive and said something to the driver. Due to the immediate safety concern, Officer Hawkins ordered Douglas to shift the vehicle back into park and they conducted a pat-frisk of him. Although nothing was found on Douglas, all four occupants were removed from the vehicle and sat or leaned on the jersey barrier by the road. Officer Hawkins opened the front passenger door of the vehicle and observed a revolver under the front passenger seat where Douglas had been seated. All four occupants of the vehicle were handcuffed and detained. Douglas and Steed were both charged with possession of the firearm and subsequently filed a motion. The motion was allowed in District Court and the Commonwealth appealed.

The Appeals Court heard the case on appeal and found that the stop of the vehicle was justified and that the police did not exceed the scope of the search when they looked under the passenger's seat before the occupants returned to the vehicle. Even though the police had recovered nothing during the pat frisks, the Appeals Court found that the police still had reasonable suspicion to search the interior of the vehicle because the safety concern had not ended. Following the Appeals Court's holding, the SJC heard the case on appeal.

Conclusion: The SJC concluded that the protective sweep of the interior of the vehicle was justified due to Douglas's subsequent conduct. The SJC analyzed the following issues:

1. Was the stop justified?
2. Was the exit order and pat-frisk of the passengers lawful?
3. Was the protective sweep of the motor vehicle lawful?

1st Issue: Was the stop justified?

There was no dispute that the stop was justified because the police had observed a traffic violation. See ***Commonwealth v. Santana***, 420 Mass. 205, 207, 210 (1995). Police may "order the driver or the passengers to leave the automobile only if they have a reasonable belief that their safety, or the safety of others, is in danger." ***Commonwealth v. Torres,*** 433 Mass. 669, 675 (2001). A police officer may conduct a pat-frisk of an individual ordered to leave the vehicle only if the officer has a reasonable basis to suspect that the individual is likely to be armed and dangerous. ***Commonwealth v. Johnson***, 454 Mass. 159, 162 (2009).

2nd Issue: Exit Order and Pat-frisk of Passengers

In this case there were a number of factors that justified the police's exit order and pat-frisks of the Douglas, Steed and Johnson in this case.

The factors included the following:

1. Potential gang fight

2. Past History of crimes including some firearms offenses

3. Police officer's training and experience: One of the officers had encountered Douglas more than 50 times and he knew him on first name basis.

4. Unusual movements: Johnson's pivoting and leaning towards the center of the vehicle raised some concerns. One of the other passengers, Steed, clutched his sweatshirt pocket as if he was holding something.

5. Failure to comply with police orders: Steed was asked three times to exit the vehicle before he complied.

6. Douglas's behavior: Douglas opened the door of the vehicle without being asked to do so.

All these factors provided justification for the police that one of the passengers may be armed. However, after conducting the pat-frisks of the rear seat passengers, Steed and Johnson and finding nothing, the SJC held any reasonable suspicion police may have had that a weapon was in the vehicle dissipated. There was no reasonable suspicion to justify a protective sweep of the automobile after police conducted a pat-frisk of Johnson and Steed and found nothing. The actions giving rise to the initial suspicion of the rear seat passengers, Steed and Johnson were only as to their persons; the officers did not observe any motion, such as bending down out of sight, that suggested reaching for or placing a weapon on the floor.

3rd Issue: Protective Sweep of the Interior of Vehicle

The SJC held that Douglas's additional conduct, in conjunction with the other circumstances, provided reasonable suspicion that Douglas was armed and dangerous, and either had a weapon on his person or had concealed it in the area where he had been sitting. Douglas' subsequent conduct justified a protective sweep of the motor vehicle.

"An officer who does not have probable cause to search an automobile for evidence of a crime or contraband may nonetheless conduct a limited search for weapons if 'a reasonably prudent officer in the officer's position would be warranted in the belief that the safety of the police or that of other persons was in danger.'" ***Commonwealth v. Silva***, 366 Mass. 402, 406 (1974). Such a protective search must be "'confined in scope to an intrusion reasonably designed to discover' a weapon," ***Commonwealth v. Moses***, 408 Mass 136, 144 (1990), quoting *Commonwealth v. Silva*, *supra* at 408, and "'must be confined to the area from which the suspect might gain possession of a weapon,' either because he is still within the vehicle or because he is likely to return to the vehicle at the conclusion of the officer's inquiry." See ***Commonwealth v. Almeida***, 373 Mass. 266, 272 (1977), S.C., 381 Mass. 420 (1980).

Furthermore, the SJC emphasized that Douglas' actions in getting out of the vehicle unasked, confronting Hawkins, and then shifting the vehicle into "drive" could have suggested to a reasonable officer that Douglas was attempting to conceal a weapon, either on his person or in the vehicle, and was willing to risk flight and possibly an automobile chase. See ***Commonwealth v. Maldonado***, 55 Mass. App. Ct. 450, 454 (2002). "When Douglas first stepped out of the vehicle, unasked, and then, upon being ordered to return to the vehicle, moved the gearshift from "park" to "drive," the police knew that the four occupants had been at a party earlier in the evening hosted by a group that had been involved in a long-standing rivalry with another group, and that the rivalry had resulted in acts of violence." See ***Commonwealth v. Elysee***, 77 Mass. App. Ct. 833, 841 (2010). The police also were aware that Douglas previously had been convicted of possession of a firearm. See ***Roe v. Attorney Gen***., 434 Mass. 418, 442 (2001); ***Commonwealth v. Dasilva***, 66 Mass. App. Ct. 556, 561 (2006).

Unlike Johnson's and Steed's actions, "Douglas' acts of leaving the vehicle unasked, expressing displeasure to the officer, and then shifting the vehicle into drive after he returned to his seat could have indicated to a reasonable officer that Douglas might be in possession of a firearm, either on his person or within his reach inside the vehicle." Douglas' actions, combined with the occupants' activities earlier that evening, and the officers' knowledge, were sufficient to support a reasonable suspicion that Douglas either had a weapon on his person or that there was a weapon in the vehicle, within his reach, and removed any possible taint from the earlier exit orders. See ***Commonwealth v. Borges,*** 395 Mass 788, 795 (2002). Although no weapons were found on Douglas' person, the police continued to have a reasonable suspicion that there might be a weapon in the vehicle and therefore it was permissible for the police to conduct a protective sweep before allowing Douglas and the other occupants to reenter the vehicle.

- **TRAINING TIP:** This case serves as a good review of the legal requirements required for a pat-frisk for weapons and a protective sweep of a motor vehicle. Once again, the SJC is considering the "totality of the circumstances," when evaluating whether there is an officer safety issue.

Lunging in the backseat was sufficient to raise a concern for officer safety.

Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737 (2015): Officer Brendan Reen of the Swampscott Police Department stopped the defendant for operating a motor vehicle without a valid inspection sticker. The defendant gave Officer Reen his license and registration. Officer Reen observed clumps of what appeared to be marijuana on the console but he did not suspect the defendant was impaired and he did not issue a citation for the civil infraction of possession of marijuana. *See* G. L. c. 40, § 21D. When asked if he would consent to his motor vehicle being searched, the defendant said "no." Officer Reen told the defendant that he had probable cause to search the vehicle. In response to Officer Reen's statement, the defendant, who was not secured by a seatbelt, suddenly turned away from the officer and, "lunged" toward the passenger's side of the backseat where there was a backpack. Officer Reen testified that he was concerned for his safety, and he immediately put his right hand on the defendant's left shoulder through the vehicle's open window to prevent the defendant from reaching into the backseat. Officer Reen instructed the defendant to turn off the ignition and step out of the vehicle. The defendant complied and Officer Reen removed the backpack and placed it on the hood of the defendant's vehicle. Officer Reen discovered an electroshock weapon (commonly known as a stun gun) in an open compartment in the driver's side door. Officer Reen secured the weapon and the defendant denied that the weapon belonged to him. The defendant was charged and he filed a motion to suppress.

The motion judge found that the defendant's act of reaching into the backseat was not sufficient to create a heightened awareness of danger and allowed the motion to suppress. The Commonwealth appealed and the case was reviewed by the Appeals Court.

Conclusion: The Appeals Court denied the motion to suppress. The Court compared this case to ***Commonwealth v. Gonsalves,*** which established that "an officer need point only to some fact or facts in the totality of the circumstances that would create a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." Here, Officer Reen was "faced with a specific, sudden and unexpected movement by the driver into an area of the vehicle containing backpack that could conceal weapon."

The second issue the Appeals Court considered is whether the time for detaining the vehicle should have ended after the defendant produced his license and registration. Here, Officer Reen had not yet issued a citation or warning, nor had he returned the defendant's license and registration. The length of detainment was not unreasonable based on the facts. Additionally, the Court found that even if Officer Reen's request to search the motor vehicle was designated as an unlawful inquiry after he observed the marijuana, the defendant's independent, intervening act of lunging in the backseat justified Officer Reen's exit order and discovery of the stun gun.

Examples of Other Officer Safety Cases

Commonwealth v. Stack, 49 Mass. App. Ct. 227 (2000): Where police have concern about their safety that there may be armed gang members, police do not need to see the driver or passengers commit any violations in order to issue an exit order.

Commonwealth v. Stampley, 437 Mass. 323, 325-326 (2002): The Commonwealth does not have to prove that driver or passenger had a weapon in order to establish that an officer establish that there was a safety issue during a stop.

Commonwealth v. Obiora, 83 Mass. App. Ct. 55 (2013): The Court held that an exit order and search were valid based on the "totality of the circumstances." Viewed in the "totality of the circumstances," a lone officer, late at night, with three detained persons and false identification information had "a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." The exit order was not "an intrusion disproportionate to the seriousness of the situation with which the trooper was confronted." See ***Commonwealth v. Washington****,* 459 Mass. 32, 40 (2011).

Commonwealth v. Moreira, 388 Mass. 596, 600 (1983): The Court held that even if an officer makes an incorrect statement about the law, there is no justification for a person to use force against an officer or make a movement which could be perceived by the officer as a safety threat to the officer or anyone else present.

Motor Vehicle Stops and & Pat-frisk

United States v. Raymond Martinez, U.S. 1st Circuit Court, No. 12–2219, (2014): Since Framingham police were concerned there may be some gang retaliation following a wake for two Latin Kings members, they were monitoring the area near a park. Police stopped a vehicle that sped away. The driver was identified as Michael Tisme, and Raymond Martinez, was the front seat passenger. Tisme and Martinez were members of the "Bloods" street gang and Martinez had prior charges of assault and battery with dangerous weapons. Police arrested Tisme because he was unable to provide a license or registration. Martinez failed to comply with police orders to keep his hands visible.

Police ordered Martinez out of the vehicle and conducted a pat-frisk. A loaded firearm was removed from Martinez's waistband and he was arrested. Martinez filed a motion to suppress the firearm arguing that the officers had no reasonable suspicion that he was armed and dangerous when he was frisked. See ***Terry v. Ohio***, 392 U.S. 1 (1968). The motion was denied and Martinez appealed. The key issue the 1st Circuit considered was whether the police had sufficient reason to assume that the Martinez was armed and dangerous based on the "totality of the circumstances."

Conclusion: The 1st Circuit concluded that the pat-frisk of Martinez was supported by reasonable suspicion:

First, Martinez's unusual movements towards his waist along with his failure to comply with police orders gave police reasonable suspicion to perceive he may be reaching for a weapon.

Second, the police's heightened response was supported by the fact that the police were in a highly volatile situation and were not relying simply on gut feelings, but on objectively reasonable justifications for suspecting that there may be some gang violence in retaliation of the wake of murdered "Latin Kings" member.

Third, Martinez and Tisme were members of the Bloods street gang. Martinez also had a prior history dangerous weapons offenses and with assault and battery. Considering the nature of the occasion, the reaction of a car full of gang members when a police car approached, and the refusal to keep hands visible, the 1st Circuit held that the police were justified in conducting a pat-frisk of Martinez and the denial of the motion to suppress was upheld.

HYPOTHETICAL: Officer Johnson received a report that there was a man threatened his ex-girlfriend by gunpoint and took off with two of his friends in a silver ford Taurus. Officer Johnson was driving on Route 28 in Randolph when he observed a silver ford Taurus parked in the parking lot of Dunkin Donuts. Immediately, Officer Johnson called for backup and stopped the silver Taurus. As Officer Johnson approached the vehicle the driver and passenger jumped out of the vehicle and took off running into one of the neighborhoods. Officer Johnson stopped the passenger in the backseat and restrained him with handcuffs. Nothing was recovered after conducting a pat-frisk of the backseat passenger. When the other officers arrived on scene, they looked for the other two people who took off. No one else was found. At this point, the officers opened the backpack which was on the seat next to the backseat passenger. Can the police open the backpack without pat-frisking it first because of an officer safety issue?

OPTION: This hypothetical is based upon ***Commonwealth v. Rutledge,*** WL 3671876 (2014)***.***

In ***Rutledge*** the Court found that there as not exigency because the backseat passenger was restrained. The Court also held that the police should have conducted a preliminary pat-frisk of the backpack to establish whether a possible weapon was present or not. Since the Court did not find that there was an officer safety issue, it concluded that the police should not have deviated from protocol.

Searching A Motor Vehicle After Stop

Commonwealth v. Teixeira-Furtado**,** 87 Mass. App. Ct. 1133 (2015)**:** Boston Police officers working in the Youth Violence Strike Force were on patrol in an unmarked vehicle. They observed a known gang member driving a Honda with the defendant sitting in the front passenger seat. The Honda was speeding in an area where there was at least "one park and plenty of kids around." Police activated their lights and sirens but the Honda did not stop. Eventually, the Honda slowed down and the defendant exited the Honda with the vehicle still moving. The defendant ran across the street and was "grabbing the right side of his waist

area. The officers chased the defendant and drew a firearm ordering the defendant to stop. The defendant stopped and said "all I have is a gun." Police arrested the defendant and charged him with unlawful possession of a firearm. A motion was filed and the issue focused on whether the police had reasonable suspicion to believe the defendant had a firearm.

The judge allowed the motion to suppress and found that there was no testimony regarding the rate of speed the Honda was traveling to justify a stop for violation of G.L. c. 90 §17. Specifically, the judge wrote that "without specific, articulable, objective facts that explain the conclusion, a finding that the Honda was traveling at an unreasonable rate of speed would amount to rubber-stamping of police action without inquiry into the underlying reasons for the challenged conclusion."

Conclusion: The Appeals Court denied the motion to suppress on appeal. "Whether there is a reasonable suspicion that a violation of G.L.90 §17 has occurred, requires a consideration of a number of objective factors and should not be limited to on isolated factor of miles per hour." The Appeals Court found that motion judge relied too narrowly on the rate of speed and failed to consider other specific articulable facts that provided the police with reasonable suspicion;

(1) residential setting of the road the Honda was driving;

(2) safety of the public which included testimony of officer about the park and kids in the area;

(3) police vehicle being 15-10 feet from the stop sign when the Honda passed it;

(4) short distance the Honda drove before it activated its blue lights and sirens; and

(5) testimony of the officer that the speed limit in the area was 25-20 miles per hour.

III. Constructive Possession

Actual Possession & Constructive Possession

Commonwealth v. Rosa, 17 Mass. App .Ct. 495, 498, 459 N.E.2d 1236 (1984): The Court defined constructive possession as an awareness of contraband coupled with an ability and intent to control it. The primary difference between constructive and actual possession involves the fact that "physical possession entails the ability to control, and would ordinarily entail knowledge as well, thus making it unnecessary, in an actual possession case, to list these elements as part of the definition of possession."

Commonwealth v. Crapps Jr. 84 Mass. App. Ct. 442 (2013): The Appeals Court affirmed the convictions and emphasized that the surrounding circumstances were sufficient to prove constructive possession.

- Items recovered in the vehicle including cell phone and personal papers belonged to the defendant,

- Defendant had exclusive control of his girlfriend's vehicle, and

- Defendant engaged in suspicious activity when he picked up unknown family and drove a short distance and let the female out of the vehicle.

Collectively, the defendant's actions along with the additional incriminating evidence "tip the scale" to prove that there was sufficient evidence that the defendant constructively possessed the drugs recovered from the vehicle.

Constructive Possession in Motor Vehicle

Constructive possession requires knowledge, intent and ability to control and object!

Commonwealth v. Cullity, 470 Mass. 1022 (2015): State Trooper Nicholas Peter Fiore stopped a motor vehicle in Chelsea because it had a broken headlight. While speaking with the driver, Trooper Fiore detected a "very strong odor of something that appeared to be a freshly burnt substance" emanating from the vehicle. The driver provided her license and registration but failed to respond when asked about the odor. Timothy Cullity was sitting in the front seat without a seatbelt. Cullity had watery, bloodshot eyes and appeared lethargic. Trooper Fiore asked Cullity three (3) times for his license. The driver was ordered out of the vehicle after it was confirmed she had a suspended license. Cullity also had a suspended license. The driver was arrested and as Trooper Fiore returned to the vehicle he saw a partially burnt "handmade cigarette" in plain view on the driver's seat. Cullity was ordered out of the vehicle and Trooper Fiore conducted a pat-frisk. Although no weapons were found on Cullity, Trooper Fiore searched the vehicle and found a metallic spoon with burned residue on it, cotton swabs, hypodermic needles and caps, and a clear plastic bag containing five smaller bags of a brown substance, which the parties stipulated was PCP. The brown substance emitted the same odor as the interior of the vehicle and the burnt handmade cigarette. The clear plastic bag was found in the space between the front passenger's seat and the driver's seat, within inches of the passenger's seat.

Cullity was arrested and acknowledged using PCP that evening. Cullity's statements along with Trooper Fiore's testimony about Cullity's condition at the time of the stop support an inference that Cullity had used PCP that evening. Cullity was convicted of possession of a class B substance, namely, "PCP," and he appealed. The Appeals Court concluded that the evidence was insufficient to establish constructive possession and reversed Cullity's convictions.

Conclusion: The SJC granted further appellate review and affirmed Cullity's convictions. The SJC considered whether Cullity, who was a passenger in a motor vehicle, had constructive possession over the PCP found. The SJC concluded that Cullity intended to exercise dominion and control over the PCP that was found in the vehicle. While Cullity's presence in the vehicle alone would not be sufficient to establish this intention, "presence, supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency." ***Commonwealth v. Albano***, 373 Mass. 132, 134 (1977). This was not a case of mere presence because Cullity admitted to using PCP earlier in the evening and there were items that would suggest recent drug use in the vehicle. Trooper Fiore's observations of Cullity's appearance and behavior also

supported the inference that Cullity was under the influence of PCP throughout the encounter. In sum, Cullity's intent to exercise dominion and control over the PCP was established beyond a reasonable doubt.

IV. Inventory Searches with Motor Vehicles

An inventory search is a warrantless search of either a lawfully impounded motor vehicle or a person who is arrested and it is permitted under both the Fourth Amendment and Article 14. The purpose of an inventory search is to protect personal property, minimize claims of theft against the police department, and protect the police and public from dangerous items. Police are not supposed to transform an inventory search into an investigatory search. ***Commonwealth v. Murphy***, 63 Mass. App. Ct. 11, 15-17 (2005).

Inventory Searches are not meant to discover evidence of a crime!

Two rationales for justifying impoundment and a subsequent inventory:

1. public safety, and

2. the risk of property damage to a vehicle left parked on a street and possible claims against the police for potential damage to it if left unattended

Commonwealth v. Alvarado, 420 Mass 542 (1995): Using a K-9 unit while conducting an inventory search was prohibited because it transformed an inventory search into an investigatory search. Police may conduct an inventory of the contents of the automobile in accordance with standard, written department procedures.

Standards for Conducting an Inventory Search

Commonwealth v. Crowley-Chester, 86 Mass. App. Ct., 804 (2015): Springfield Police were on patrol when they observed a dark-colored Honda legally parked next to a vacant lot with its engine running and lights off. As the officers approached the vehicle and illuminated the vehicle's interior, the defendant passenger, Atreyo Crowley-Chester slouched down in his seat. One of the officers saw the defendant quickly move his left hand between the center console and his left leg attempting to conceal a dark-colored object in his hand. Although it was later established that the dark object in the defendant's hand was a glove, the officers ordered both occupants to show their hands. The occupants failed to comply with the officers' commands.

The police also observed in plain view a knife in the center cup holder and ordered the driver and the defendant out of the vehicle. The driver placed his right hand in his jacket pocket as he was getting out of the vehicle and was ordered to remove it. When the driver pulled his hand from his jacket pocket, a white, rock-like substance fell to the ground. Based on their experience, the police recognized the substance to be "consistent with crack cocaine." The police seized a knife and arrested the driver. The driver requested that the defendant drive the Honda from home. Since the passenger did not have a driver's license, the police impounded the vehicle.

According to Departmental policy, the police conducted an inventory search. Gloves, a ski mask, a hooded sweatshirt, and a pair of sunglasses and a backpack with the driver's name "Atreyo," inscribed on it in the trunk were recovered. Under the written police inventory policy of the Springfield police department, the police opened unlocked containers which included a backpack. The police found a loaded handgun, another hooded sweatshirt, gloves, and a pay stub with the defendant's name on the backpack. The driver was charged with carrying a firearm without a license, in violation of G. L. c. 269, § 10(a), and possession of a firearm or ammunition without a firearm identification (FID) card, in violation of G. L. c. 269, § 10(h). The defendant filed a motion to surpress and the District Court Judge allowed the motion and suppressed the loaded firearm recovered that was recovered by police during an inventory search.

Conclusion: The Appeals Court concluded that the motion judge applied the wrong legal standard when hearing the motion regarding the impoundment of the vehicle. The legal standard is not based upon necessity but rather if the police reasonably undertook the inventory search based on the circumstances confronting them.

1st Issue: Was impoundment and inventory of the vehicle necessary?

The motion judge determined that it was not necessary for the police to impound the motor vehicle and subsequently inventory it. The Appeals Court denied the motion to suppress and held that it was reasonable for the police to impound and subsequently inventory the vehicle. Additionally, the Court concluded that the impoundment and inventory search, under a written police policy, is based on "an officer's judgment in the matter is to be tested by what reasonably appeared to him at the time" ***Commonwealth v. Sanchez***, 40 Mass. App. Ct. 411, 415 (1996).

"The decisions demonstrate that our determinations are fact driven, with the overriding concern being the guiding touchstone of reasonableness." ***Commonwealth v. Ellerbe***, 430 Mass. 769, 776 (2000). The judge in the suppression hearing applied the necessity standard which is not the appropriate governing standard for evaluating the propriety of an impoundment and inventory.

"The impoundment of a vehicle for noninvestigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended" (emphasis added). ***Commonwealth v. Brinson***, 440 Mass. 609, 612 (2003), quoting from ***Commonwealth v. Daley,*** 423 Mass. 747, 750 (1996). Here, both rationales apply. The police observed a Honda parked with the engine running in a high crime area; the defendant's slouching down when the cruiser spotlight was directed at the Honda; the defendant's additional furtive movements in trying to hide a dark item (a glove) behind the center console; the occupants' refusal to comply with the police order to show hands; the plain sighting of the knife in the center cup holder; the dropping of crack cocaine from the driver's pocket; and the driver's request to have the unlicensed defendant drive the Honda away, yielded a reasonable basis for the police to be concerned, as a matter of public safety, that weapons and drugs (in addition to the discovered knife) might be contained within the

Honda. See ***Commonwealth v. Dunn,*** 34 Mass. App. Ct. 702, 703-704 (1993) (impoundment justifiable if supported by reason of public safety); ***Commonwealth v. Allen***, 76 Mass. App. Ct. 21, 24 (2009). Police were compliant with Springfield's inventory policy which allowed closed or locked containers including the trunk of a vehicle if there was a concern that a dangerous item may be included in the vehicle.

Second, the Court determined that the threat of potential vandalism or damage to a vehicle, such as this Honda, were it to be left vacant and parked on William Street in this high crime area was genuine. The CAD record which was admitted into evidence showed that in a six-month period of time, there were documented police reports of such offenses as vandalism, burglary, and suspicious vehicles moving about in that area. There were numerous burglaries, theft, and motor vehicle offenses and seven incidents involving the breaking and entering of a residence; four reports of larcenies; one armed robbery; and one incident of vandalism.

Furthermore, the CAD reflects two police responses involving the breaking and entering of motor vehicles, two reports of suspicious motor vehicles, and eight incidents called into the police station which are referred therein generically as traffic control, but which required, and received, a police response to the subject area. One of the Springfield police officers testified that he personally was aware of a number of crimes that had taken place in the area, including car break-ins and stolen motor vehicles — happenings which the officer cited as providing a reasonable basis for impounding the Honda, rather than leaving it abandoned on William Street. Under the standard set forth in ***Commonwealth v. Ellerbe***, 430 Mass. at 776, there were reasonable police concerns about potential theft or vandalism to the Honda if left unattended. The Court denied the motion to suppress and found that since there was both a public safety and vandalism/property damage rationales supported the impoundment of the Honda and its inventory search pursuant to the written Springfield police policy.

SPRINGFIELD POLICY

"It shall be the policy of this department to inventory the contents of all motor vehicles that are towed by his department. The purposes of this inventory are to:

"1. Determine whether there is any personal property in the vehicle that needs to be protected from loss or damage.

"2. To protect the department and its personnel from claims of a failure to protect such property.

"3. To protect the department and its personnel from false claims of loss of property that was never in the vehicle.

"4. To protect departmental personnel and the public against injury from dangerous substances or items that may be in the vehicle.

PROCEDURE

"Whenever a motor vehicle is ordered towed by a department member, that member shall assume the responsibility for inventorying and safeguarding the contents of the vehicle. The scope of this inventory shall include any locked or closed containers within the vehicle that can be opened without damage as well as any locked portions of the vehicle itself that can be accessed without causing damage (e.g. glove box, trunk, suitcases, boxes etc.) The department member ordering the tow shall list all items found within the vehicle in the remarks section of the tow sheet. Any monies or articles of value that may be subject to loss or damage shall be taken and submitted to the property division for safekeeping. A notation as to which items were so removed as well as the property tag numbers shall be made in the remarks section of the tow sheet. Anything believed to be dangerous, contraband, or evidence of a crime shall be seized and tagged and a report submitted to the proper bureau."

- **TRAINING TIP:** The Court analyzed the policy and procedure of Springfield Police to verify that the officers' actions were compliant. Last year, the Court held in the ***Torres*** case, that as long as the procedure if followed, mistakenly failing to complete a required form would not be sufficient to overturn a valid inventory search. ***Commonwealth v. Torres***, 85 Mass. App. Ct. 51, 53-55 (2014): *The Court found that the search was justified and that excluding the evidence discovered based on after-the-fact procedural deficiencies would not serve the purposes for which the exclusionary rule was established*. See ***Commonwealth v. Aldrich,*** 23 Mass. App. Ct. 157, 162-163 (1986). Finally, courts in other jurisdictions have addressed the same issue and have reached the same conclusion. See, e.g., ***United States v. Loaiza-Marin,*** 832 F.2d 867, 869 (5th Cir. 1987).

Scope of Inventory Search

Commonwealth v. Allen, 76 Mass. App. Ct. 21 (2009): The Court concluded that opening a closed book bag and opening an unlocked container found inside was lawful. The key factor in this case was that the department inventory policy specifically stated that *"all unlocked containers shall be opened and their contents inventoried."*

Commonwealth v. DiFalco, 73 Mass. App. Ct. 401 (2008): This appeal presents the question whether the opening of a locked safe, was proper during an inventory search of an automobile. The Court held the search was improper *because the department policy regarding inventory searches specifically required that all locked containers be inventoried as a single unit.*

Commonwealth v. Figueroa, 412 Mass, 745 (1992): The Court found that plain observation and seizure of drugs behind cardboard panel in vehicle door was lawful and in accordance with the Department's policy regarding inventory searches.

V. Miscellaneous Driving Issues

Windshield Wiper Law

Pursuant to Chapter 481 of the Acts of 2012: An Act Relative to the Use of Headlights **drivers are required to turn on a vehicle's headlights when using windshield wipers.**

Section 15 of chapter 85 of the General Laws was amended starting April 7, 2015, began requiring that drivers turn on the vehicle's headlights when using windshield wipers. Below is the exact language that was passed:

A vehicle, **whether stationary or in motion, on a public way**, shall have attached to it headlights and taillights which shall be turned on by the vehicle operator and so displayed as to be visible from the front and rear during the period of 1/2 hour after sunset to 1/2 hour before sunrise; provided, however, that such headlights and taillights shall be turned on by the vehicle operator at all other times when, due to insufficient light or unfavorable atmospheric conditions, **visibility is reduced such that persons or vehicles on the roadway are not clearly discernible at a distance of 500 feet or when the vehicle's windshield wipers are needed; provided further,** that this section shall not apply to a vehicle which is designed to be propelled by hand; and provided further, that a vehicle carrying hay or straw for the purpose of transporting persons on a hayride shall display only electrically operated lights which shall be 2 flashing amber lights to the front and 2 flashing red lights to the rear, each of which shall be at least 6 inches in diameter and mounted 6 feet from the ground.

Penalty: Failure to comply with the new headlight law will result in a minor surchargeable traffic violation and a $5.00 fee.

Notice of License Violations

Commonwealth v. Oyewole, 470 Mass. 1015 (2014): The defendant, Razak Oyewole pled guilty to the charge of operating while under the influence of liquor. As a result of his admission, the defendant's license was suspended for sixty days. A Wilmington police officer stopped the defendant when he observed the defendant driving his motor vehicle with its lights off at 12:30 A.M. The defendant was the driver and only occupant of the vehicle. The officer requested the defendant's license, which the defendant produced. The officer confiscated the license and placed the defendant under arrest. The defendant was arrested and charged with operating a motor vehicle with a suspended license under G. L. c. 90, § 23. The defendant was convicted and appealed arguing that the Commonwealth failed to prove beyond a reasonable doubt that the defendant operated his motor vehicle in violation of G. L. c. 90, § 24[1][a]); and (4) The issue before the SJC was whether there was sufficient evidence to establish that the defendant violated the above statute.

Conclusion: The SJC concluded that the defendant did not have sufficient notice that his license was suspended. Based on the evidence presented at trial, it was possible to infer that the defendant did not have notice that his license was suspended since he had his license in

when the officer stopped him. Although the docket sheet from the OUI case permits an inference that the defendant was present when his license was suspended, there is no evidence that established that the Commonwealth communicated to the defendant that his license was suspended. Additionally, when the defendant was stopped, he had his license in his possession and gave it to the police officer. According to G. L. c. 90, § 23, when a license is suspended in connection with a conviction for operating while under the influence pursuant to G.L. c.90, §24D, the license must be surrendered to the probation department. Here, the defendant apparently did not surrender his license and as a result, it is reasonable to infer that the defendant was never notified that his license was suspended.

- **TRAINING TIP:** Although the SJC is gave more latitude in presuming the defendant did not receive proper notice regarding his license suspension, it is unlikely the officer would have allowed the driver to leave based on the liability concerns.

Leaving the Scene of a Motor Vehicle Accident:

Key Elements for Leaving the Scene of a Motor Vehicle Accident G. L. c. 90, § 24(2)(a):

1. Suspect operated motor vehicle
2. On a public way
3. After colliding with another motor vehicle
4. Suspect knew he/she had collided with the other vehicle
5. Suspect never made known verbally the suspects, name, address and registration to the other motor vehicle operator

Commonwealth v. Martinez, 87 Mass. App. Ct. 582, (2015): The defendant sideswiped a parked vehicle in Charlestown while the owner, Jessica Cordeiro was sitting in the driver's seat. The defendant got out of her vehicle and approached Cordeiro. The defendant's sister who was driving in a separate vehicle also stopped and then proceeded to drive away in the defendant's vehicle. Cordeiro noted the license plate number on the station wagon, and the police were called. When Cordeiro asked the defendant for her license and registration, the defendant told her that information was in the vehicle her sister just drove away. The defendant asked the Cordeiro not to call police and to "take care of things between them." Before police arrived, the defendant's sister returned with the vehicle and the defendant attempted to give Cordiero her license and registration. Cordeiro refused and preferred to wait for police. The defendant and her sister then entered the station wagon and left and Cordeiro never received any information from the defendant. Police tracked down the defendant and she was charged and ultimately convicted of leaving the scene of an accident without providing her name, address, and vehicle registration number. G. L. c. 90, § 24(2)(a).

Conclusion: The defendant challenged the findings and argued that there was insufficient evidence to prove she left the scene of the accident. Pursuant to G. L. c. 90, § 24(2)(a), "requires the tendering on the spot and immediately of explicit and definite information as to himself of a nature which will identify him readily, and make it simple and easy to find him thereafter." ***Commonwealth v. Horsfall***, 213 Mass. 232, 236 (1913). Here the defendant did not make her information known to Cordeiro either through documentation or verbally. As a result there was sufficient evidence to support the conviction.

> **TRAINING TIP**: ***Martinez*** is a good review of the elements for Leaving the Scene of a Motor Vehicle Accident. The key issue in this case focused on the fact that defendant did not provide any information to the owner of the vehicle. If she had provided her name or address orally, the charge may not have stuck. Additionally, police could have pursued other criminal charges that involved property damage. For example, malicious destruction of property over, malicious destruction of property under $250 or vandalism are other options if there is property damage to involving a motor vehicle.

Commonwealth v. Morris M., 70 Mass.App.Ct. 688, 876 N.E.2d 462 (2007): A juvenile was riding in his friend's jeep. The friend's mother had allowed her son to use her jeep to drive his friends to a party. After the party, they met with another group of boys at a nearby Golf Center. One of the boys, identified as Sean, hopped into the jeep and that is when the juvenile began swinging around an "eight ball" he had wrapped inside a handkerchief. In the course of this action, the juvenile "smashed" out the Jeep's back left window with the makeshift weapon.

The juvenile then moved into the driver's seat, "hit the gas," drove across the parking lot, and crashed through a chain link fence onto the driving range grass. The juvenile continued driving on the driving range and drove in circles until he collided with a utility pole. The Jeep was seriously damaged and inoperable. The front end was smashed in, the undercarriage was damaged, and it had to be towed away. The juvenile was charged with willful and malicious destruction of property under G.L. c. 266, § 127.

The juvenile argued there was insufficient evidence to prove willful and malicious destruction of property because there was no direct evidence of malice that these intentional acts were done out of cruelty, hostility, or revenge. The evidence of the juvenile's hostile acts toward Sean, and his conduct in avoidance of Sean and the others, do not equate to destructive acts that were by design hostile to the owner (even if unknown) of the property. Rather, the evidence demonstrated that the juvenile's conduct was wanton, i.e., the acts he committed were "done heedlessly and in reckless disregard of the rights of others." ***Nolan & Sartorio, supra at 440***. See ***Commonwealth v. Byard,*** 200 Mass. 175, 177–178, 86 N.E. 285 (1908). The Court vacated the charges of willful and destruction of property because it found the juvenile's acts did not satisfy the required elements.

Relying upon RMV Records is Reasonable

Commonwealth v. Ramos, 88 Mass. App. Ct. 68 (2015): A state trooper was relying up on information supplied by the RMV regarding stolen motor vehicles. The trooper stopped the defendant and charged him with unlicensed operation of a motor vehicle under G.L. c. 90, §

10, and receiving a stolen motor vehicle, subsequent offense, G.L. c. 266, § 28. The defendant appealed and argued that the RMV does not satisfy *Aguilar-Spinelli* test because it fails to demonstrate a basis of knowledge and cannot be relied upon.

The Appeals Court held that the police may make a traffic stop when they have a reasonable, articulable suspicion that a person is committing or is about to commit a crime. See ***Commonwealth v. Greenwood***, 78 Mass. App. Ct. 611 (2011). Here the trooper used a mobile data terminal and database which indicated that the motor vehicle was stolen and provided the description of the motor vehicle matched what the defendant was driving. "Whether the trooper had reasonable suspicion depends on whether it was reasonable for the trooper rely upon the RMV record that indicated the motor vehicle was stolen."

RMV records have sufficient reliability and do not qualify as an anonymous informant. The defendant argued that the information obtained from the RMV database was like a radio broadcast. The Court did not agree and held that the trooper has no basis to question the RMV or to verify it independently. ***Commonwealth v. Wilkerson,*** 436 Mass 137 (2002). There are safeguards in place for anyone who files a false stolen motor vehicle report that will result in criminal prosecution. Because false reports of motor vehicles are punished by statute, it is both reasonable and practical to assume that reports of stolen vehicles to the RMV are reliable. The Court concluded that the trooper was reasonable to rely upon the RMV database and the information provided him with reasonable suspicion to stop the defendant. Since the stop of the defendant was supported by reasonable suspicion based on reliable information, the stop was justified and did not violate the defendant's rights under the Declaration of Rights, art. 14, or the Fourth Amendment."

RMV's Required Disclosure

"An Act Relative to Sharing Information by the RMV" was enacted on January 6, 2015, and becomes effective on January 1, 2016. G.L. 90 requires that following any suspension or revocation of § 22 (a) or (b), 22F, 22I, 24, 24½, 24D, 24G or 24L, the registrar shall timely notify the police department of the municipality in which the licensee or registrant resides.

Information that must be provided:

- RMV must provide written notice of the name and address of the licensee or registrant
- License plate number of any vehicle registered to the operator at the time of the suspension or revocation and:
- The reasons for the suspension or revocation, accompanied by a copy of the operator's driving record; provided, however, that the registrar shall timely notify the police department following any reissuance of the license or registration.

Additional Requirements: RMV must submit a report to the Joint Committee on Transportation and the House and Senate Committees on Ways and Means on the plan for implementing these requirements. The report should include how the information will be transmitted to the municipalities along with the volume and necessary capabilities. The report must be submitted by September 1, 2015.

Chapter 2

CRIMINAL PROCEDURE

The Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights govern all police searches and seizures in Massachusetts.

Fourth Amendment of the United States Constitution

The Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Under the Fourth Amendment, the courts analysis on the reasonableness of the search will be based on the "totality of the circumstances."

Article 14 of the Massachusetts Declaration of Rights

Article 14 states, "every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." The court's analysis on the reasonableness of the search has two (2) aspects: (1) What is the legal standard under which the search will be justified (reasonable suspicion, probable cause, or some other standard) and (2) Is a search warrant required in all instances?

The *Fourth Amendment and Article 14* only prohibits against unreasonable searches and seizures. In determining whether a search was reasonable, the court considers the following: (a) was a search warrant required, (b) was the warrantless search permissible by law or by school rules, (c) was the search based upon probable cause or reasonable suspicion, (d) was the suspicion particularized to a particular person or particular place, and (e) did the particular suspicion dispense prior to the search?

Reasonable Suspicion & Probable Cause

A. ***Reasonable Suspicion:*** Is based on specific and articulable facts upon which reasonable inferences can be drawn, that a person has committed, is committing, is about to commit a crime, or is armed and dangerous. In

***Commonwealth v. Wren*, 391 Mass. 705, 707 (1984),** the court stated, "[a] *hunch will not suffice."*

***B. Probable Cause*:** Is based on the belief that it is "more likely than not" that the suspect has committed or is committing a specific crime as well as the belief that it is "more likely than not" that evidence will be discovered at a particular location. ***Commonwealth v. Haas,* 373 Mass. 545 (1977).**

A police officer may establish either reasonable suspicion or probable cause by either their own personal observations or from information received from other sources, such as: victim, witness, informant, anonymous tip, student, faculty, etc. However, when information is received from a source other than personal observations, police must establish the source's "basis of knowledge" and the "veracity" of the information.

I. Field Encounters and Detentions

Threshold Inquiry/Field Encounter

- Police officers are free to talk to anyone and can reasonably detain an individual to dispel an officer's concerns.
- Threshold inquiry does not automatically give police authority to conduct a frisk.
- Police can use mobile data terminals (MDTs) to verify a person's license information as long as the checks are random

Commonwealth v. Murdough, 428 mass 760 (1999) Police can approach any parked vehicle to check on occupants without it turning into a seizure.

Stop & Seizure

- Threshold inquiry becomes a stop when an officer uses authority to detain a person who is not free to leave. Examples, taking a person's identification, using an authoritative tone, activating blue lights, as a few examples.
- No length of time has been designated to how long police can detain a person.

Commonwealth v. Stoute, 422 Mass. 782 , 789 (1996): "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." A person is seized by the police only when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave. ***Id***. at 786.

Commonwealth v. Lyles, 453 Mass. 811 (2009): Threshold inquiry became a stop when police took Lyles' identification and lacked reasonable suspicion to believe a crime was committed. Lyles was walking alone on a sidewalk near a housing project in Boston.

Commonwealth v. Pimentel, 27 Mass. App. Ct. 557 (1989) Police need to show some sort of authority in tone that would make an average person feel they were not free to leave in order for a seizure to occur.

Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998) (activation of blue lights initiated a constitutional seizure where police officer observed erratic driving and pulled up behind the vehicle to investigate whether the defendant was intoxicated)

Frisks

- Police may have reasonable suspicion that a crime has been committed but no reason to conduct a frisk. Reasonable suspicion can be derived from an officer's personal observations or information received via an informant or dispatch.

- Exterior search of suspect and conducted to find weapons NOT to locate evidence.

- Frisks allowed when = officer safety, person is under arrest, protective sweep of a house or vehicle.

- Frisks are limited in scope.

A. Good Frisk: ***Commonwealth v. Torres***, 433 Mass. 669, (2001): The Court held that the police officer was conducted a proper pat-frisk after there was a concern for safety during a routine traffic stop. The officer felt a hard object by the defendant's waistband, and then lifted his shirt to investigate further. It was then that he discovered that the object was a gun. This sequence comports with an appropriate pat-frisk. See ***Commonwealth v. Silva,*** 318 N.E.2d 895 (1974).

B. Bad Frisk: ***Commonwealth v. Narcisse***. 454 Mass (2010): The SJC held that police cannot conduct a pat-frisk of person without reasonable suspicion.

Commonwealth v. Flemming, 76 Mass. App. Ct. 632, 638 (2010): The SJC that the defendant's cooperation and non-threatening movements, failed to justify the police's decision "to lift the defendant's shirt without conducting a pat-frisk first."

Field Encounters Involving a Firearm

Commonwealth v. Jones-Pannell, 472 Mass 429 (2015): Boston police officers were on patrol in an area considered to be "high crime" based on prior, known gang activity. There had been a shooting in that vicinity three to four months earlier and one of the officers had previously responded to an incident that had involved a firearm. On this particular evening, the police observed Olajuwan Jones-Pannell, walking alone on the sidewalk and holding his right hand inside the front of his pants and was "jousting" or "adjusting" an object as he walked. When the defendant saw the unmarked cruiser, he looked up and down the street.

One of the officers asked two or three times **"Excuse me sir, can I talk to you?"** The defendant looked away, and continued walking with his right hand inside his pants. The defendant turned the corner and began to jog away while his right hand remained inside his

pants. The officer got out of his cruiser and yelled, **"Wait a minute."** The defendant began sprinting and one of the officers pursued on foot and overtook the defendant in a driveway. As they wrestled, a handgun containing seven rounds of ammunition fell from the defendant's pants. The defendant was charged with carrying a loaded firearm without a license, carrying a firearm without a license, possession of ammunition without a firearm identification card, and resisting arrest. Prior to this incident, the officer had no familiarity with the defendant.

The defendant moved to suppress all evidence resulting from the encounter. The defendant filed a motion to suppress which was allowed because the motion judge found that the officers lacked reasonable suspicion to stop the defendant. The motion judge concluded that only, two factors were present to support reasonable suspicion: evasion and/or flight and a hand at or inside a waistband during evasion and/or flight**.** While significant and a cause for further investigation including continuing to follow the defendant, these factors are insufficient to support a conclusion that the police had reasonable suspicion. The Appeals Court heard the case last year and reversed the findings of the motion judge which allowed the motion. Earlier this year, the SJC granted further appellate review.

Conclusion: The SJC concluded that the police lacked reasonable suspicion to seize the defendant. The SJC did not find facts anew, as the Commonwealth had asked, but rather relied upon the facts found by the motion judge and contained in the record. The first portion of the SJC's decision discusses why the SJC did not find new facts on appeal.

The SJC may "affirm a judge's order on a motion to suppress based not only on the facts as found, but also on evidence that was 'implicitly or explicitly credited' by the motion judge." Although the Commonwealth asked the SJC to consider the officer's testimony anew and conclude that the neighborhood was in fact a "high crime" area, the SJC declined to do so. The Commonwealth further suggested that the SJC should supplement the motion judge's findings with additional evidence concerning the officer's training, in order to conclude that the officer reasonably suspected the defendant was carrying a firearm unlawfully. After review of the judge's findings and rulings and the record, the SJC found that the judge's findings were not erroneous and "support his general findings and conclusions." See ***Commonwealth v. Murphy***, 362 Mass. 542, 547 (1972).

The second half of the SJC's decision examined two key factors that are relevant for police. The point when the defendant was seized was significant because it considers when a defendant can walk away. Another critical factor concerned whether the police had suspicion that the defendant was engaged in criminal activity when the police approached him.

Factors Important for Police:

a. Moment when the defendant was seized: "A person is seized by the police when a reasonable person would not feel free to leave." See ***Commonwealth v DePeiza***, 449 mass. 367 (2007). Here the judge concluded that when the officer yelled, **"Wait a minute!"** and began chasing the defendant, the defendant was seized. While there was some issue, as to whether the defendant walked or jogged away, the SJC found that the point when the officer told the defendant to wait and chased him, a seizure occurred.

"The defendant was free to reject the police officer's multiple requests to speak with him, just as he was free to respond to the requests by increasing his pace." Unlike the situations in ***Commonwealth v. Powell***, 459 Mass. 572, 578 (2011) (where it was determined that there was no seizure when the flight was not prompted by police commands), the judge in this case found that the facts support the conclusion that the defendant's eventual running was prompted by the officers' actions. The officer's loud command to "wait," and his pursuit, had compulsory aspects that his prior requests did not. The evidence amply demonstrated that the defendant was not free to leave at that point. ***Id***.

b. Suspicion of criminal activity: After determining the point of seizure, the next issue addresses whether, at the time the defendant was seized, the officers "had an objectively reasonable suspicion of criminal activity, based on specific and articulable facts." ***Commonwealth v. Barros***, supra at 176. When police seized the defendant, the following facts were established. First, the defendant had given "flight from police officers and keeping his right hand in his pants between his waist and his crotch." Second, it was after midnight when police encountered the defendant. "Other factors that in some cases support a finding of a reasonable suspicion are missing: this was not a high crime area; the police didn't know the defendant; there were no reports or radio calls of a crime having been recently committed in the area and; the officers were on routine patrol."

The judge concluded that the defendant's refusal to respond to the officer's initial requests to speak with him did not create reasonable suspicion. While flight from police and holding one's hand at one's waist or inside one's pants may indicate that an individual has a weapon, it also is consistent with other, nonviolent activities. Although acknowledging these two factors to be "important," the judge determined that, without more, they were "not enough to support a conclusion of reasonable suspicion."

c. High Crime Area: The Commonwealth argued that the neighborhood could be characterized as a "high crime" area and that would add to the officers' suspicions. Although a characterization that an area is one of "high crime" may be relevant in determining whether a police officer's suspicion is reasonable, the accuracy of the characterization in a particular case depends on specific facts found by the judge that underlie such a determination, rather than on any label that is applied. See ***Commonwealth v. Johnson***, 454 Mass. 159, 163 (2009).

The SJC "cautioned that whether a neighborhood is a high crime area is a consideration that must be applied with care." "The term "high crime area" is itself a general term that should not be used to justify a stop or a frisk, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion. " See ***Commonwealth v. Gomes***, 453 Mass. 506, 513, (2009)."The judge's finding that the stop here did not take place in a "high crime" area was not clearly erroneous. Locations where firearms offenses are common, or where rival gang activity occurs, have been considered "high crime areas." See, e.g., ***Commonwealth v. Pagan,*** 63 Mass. App. Ct. 780, 781-783 (2005). Isolated incidents of nearby gun activity or the

mere presence of gangs in the vicinity does not require a finding that a particular street is a "high crime area." Here there was no evidence regarding arrests in the area, no information that a crime had occurred, or that police were on patrol for a specific criminal activity occurring there. One officer stated that he had heard of "shots fired" about two weeks prior, and that there had been a shooting and recovery of a gun within the preceding months. There was no testimony that the area was inundated with gang activity or violence involving firearms. Based on the testimony and the facts in the record, the judge concluded that the location was not a high crime area.

d. Officer's training and experience: Although the record credited the officer's testimony that he had completed an eight-hour training class titled "Characteristics of Armed Gunmen." The judge did not find that "the training by itself or in combination with other factors made the officer's suspicion objectively reasonable." Additionally, there were no detailed findings about the content of the course contained in the record or testimony regarding the officer's training.

- **TRAINING TIP:** The SJC relied upon the facts that established in the record during the motion hearing that occurred in District Court. Based on these facts, the SJC did not find any information anew and looked through a limited lens of facts. It is evident that the SJC is reinforcing with the ***Jones-Pannell*** decision the criteria they are looking for when determining that the police are justified in stopping a defendant. Here the SJC focused on the characterization of a "high crime area." The SJC suggested that information about gang activity incidents involving gun violence and other criminal activity along with testimony regarding the officer's training and experience add credibility to the high crime designation. Here the SJC found that there was not enough to establish the location as a "high crime area" and that impacted the reasonableness of the officer's actions.

Characteristics Signaling a Person may be Carrying a Firearm

Courts are emphasizing that police training and experience are critical factors when crediting whether suspect may be concealing a firearm.

Commonwealth v. Gabriel Colon, 87 Mass. App. Ct., 398 (2015): In 2011, Holyoke Police Detective William Delgado received a telephone call from the owner of Manny's Market that there were (5) five Hispanic males loitering in front of the market and he wanted police to respond. Detective Delgado and other officers drove in an unmarked vehicle to Manny's Market. "Manny's Market is in a high crime area, well known to Detective Delgado for drug dealing, firearms offenses and shootings and a Holyoke police officer had recently been killed in that area. All of the officers were in plain clothes, but wore their police badges around their necks. Upon arrival, Detective Delgado observed five Hispanic males standing on the sidewalk in front of Manny's Market. No one else was in the area and Detective Delgado recognized one of the men, Jeffrey Rosario, from past arrests for drug offenses and home invasion. Detective Delgado exited his police vehicle and moved toward the group of men for the purpose of telling them to move along. Detective Delgado noticed the defendant, Gabriel Colon, stare at him in a nervous manner. After Detective Delgado and the other police officers identified themselves and asked the men to move along, Colon began to walk away at a fast pace repeatedly looking

back toward Detective Delgado. Colon was wearing a loose shirt untucked. From a vantage point of approximately ten feet away, Detective Delgado observed a bulge on Colon's right hip underneath his shirt. Detective Delgado described the bulge as a few inches in size. Based on his training and experience, Detective Delgado believed the bulge was consistent with a firearm, both in size and location.

Detective Delgado observed Colon reach to the bulge with his right hand and make what Detective Delgado described as an adjustment with his hand. Detective Delgado ordered Colon to stop. Colon began to run and Detective Delgado pursued him down an alley, where Colon reached toward the bulge, pull out what appeared to be a firearm and throw it over a fence. Detective Delgado stopped and retrieved the firearm, a silver .380 caliber semi-automatic handgun with a black handle, approximately (5) five inches long, (3) three inches wide, and (1) one inch thick. The firearm was loaded with one bullet in the chamber. "Other officers continued to pursue Colon, apprehending and arresting him shortly thereafter." Colon was convicted after a jury-waived trial of unlawful possession of a firearm, possession of a defaced firearm, and unlawful possession of ammunition. He filed an appeal arguing that the motion to suppress should have been allowed because he was unlawfully seized. The facts are not dispute.

Conclusion: The Court affirmed the convictions and that the police were justified in stopping Colon based on all the factors that the police had at the time.

1st Issue: Did police have reasonable suspicion?

Colon argued that Detective Delgado did not have "an objectively reasonable suspicion of criminal activity, based on specific and articulable facts" that would justify the seizure. ***Commonwealth v. Stoute****,* 422 Mass. 782, 789 (1996). The Commonwealth agrees with Colon that Detective Delgado seized Colon when he yelled to stop. However the Commonwealth contends that the police had reasonable suspicion to stop Colon based on a number of factors that are listed below:

1. Familiarity and past history with other men: Detective Delgado had arrested four of the men that Colon was with on past narcotics offenses and home invasion.

2. Flight and nervous demeanor: Although Detective Delgado did not recognize Colon, he observed Colon appear to be nervous and walk away quickly when he ordered the men to disperse in front of Manny's Market.

3. High Crime Area: As indicated before there were numerous shootings in the area including a shooting that killed a police officer within the past few months.

4. Bulge in Colon's pants: Detective Delgado observed a bulge under Colon's shirt on his right hip, which, based on the detective's experience and training, was consistent with carrying a firearm. See ***Commonwealth v. King***, 389 Mass. 233, 243 (1983). Detective Delgado also saw the defendant adjust the bulge.

5. Training and experience: "Detective Delgado had been a Holyoke police officer for ten years and he worked in the narcotics and vice unit of the Holyoke Police Department as well as the gang task force. Detective Delgado was familiar with firearms, having made firearms arrests approximately (40) forty to (50) fifty times. Many of those arrests involved illegal possession of firearms on the street.

2nd Issue: Did police have reasonable suspicion that the firearm was illegal?

Colon further argued that the Detective Delgado lacked reasonable suspicion to believe that the firearm was illegal. "Mere possession of a firearm does not, by itself, justify a stop." See ***Commonwealth v. Alvarado***, 423 Mass. 266, 271 (1996).

Contrary to Colon's argument, the Commonwealth contended that it was reasonable for Detective Delgado to reasonably infer that Colon was unlawfully carrying a firearm based on a number of factors. The factors included Colon's nervous demeanor, his immediate departure from the area, his repeated looking back at Detective Delgado as he walked away, the bulge on his hip where firearms are carried, and Colon's reaching towards the bulge as he fled See ***Commonwealth v. Silva***, 366 Mass. 402, 406 (1974).

In ***Commonwealth v. DePeiza***, 449 Mass. 367 (2007), the SJC emphasized that the officer's training and nine years' experience in the district, the history of firearms in the neighborhood, the late hour, the defendant's head movements, his continuous placement of his hand inside his pants, and his accelerating evasion of the police established reasonable suspicion of unlawful possession of a firearm were significant factors that led to reasonable suspicion. The facts of this case support a conclusion that***. DePeiza*** is controlling and the officer had reasonable suspicion to stop Colon.

II. Search and Seizure

Warrantless Searches

HYPOTHETICAL

While on patrol, Officer John Brown received information about a possible Break and Entering into a residence. A description of the alleged suspects was given along with the location. Officer Brown saw two men matching the description of the suspects in the area. When Officer Brown spoke to the men, they ran away. **What are Officer Brown's options now? When Officer Brown asked to speak to the young men, had a seizure occurred at this point?**

Answer:

This hypothetical is based upon a motion to suppress that was heard in Boston Municipal Court and subsequently appealed. See ***Commonwealth v. Warren****,* 87 Mass. App. Ct., 476 (2015).

Background: A Boston police officer was in his cruiser with no lights or siren activated and no weapon displayed, when he asked to speak to the two men that matched the description of two suspects involved in Breaking and Entering. "**Hey guys, wait a minute**," the officer

stated. When the suspects made eye contact with the officer, they turned and jogged away. The officer pursued the two individuals and a firearm was recovered from a nearby sidewalk. According to the officer's testimony, "the defendant ran away and threw something on the sidewalk." The defendant was arrested and charged with unlawful possession of a firearm.

Conclusion: The opinion was NOT unanimous. The majority of the Appeals Court concluded that the officer did not stop the defendant and his companion when he asked to speak to them.

Second, the stop occurred after an aggregate of factors occurred which justified the officer's action. One factor that the Court regarded as significant was the description the officer had when asking to speak to the defendant. There had been a recent report of criminal activity in the vicinity. "In weighing reasonable suspicion, the motion judge properly considered the fact that the defendant twice ran from police officers who approached him." Furthermore, the officer had interviewed the victims of the crime at the scene, and verified the reliability of the report. The description of the men involved in the home invasion had included two men of color, dressed in dark clothing, with one man wearing a hooded sweatshirt. Although the description was general and lacked detail, the two men in this case were only 9 or 10 blocks from the vicinity of the incident.

Another significant factor involved in this case was the temperature. On this particular evening, it was only twenty-three degrees outside and none of the officers had seen anyone else walking on the street since the report. The relatively close proximity of the defendant to the time and place of the reported crime, together with the fact that the officers saw no one else on the streets on that cold evening, furnishes further justification for a threshold inquiry. Moreover, once the defendant started to run for a second time, to avoid interaction with the investigating officers, they had reasonable suspicion the defendant was involved in the reported home invasion, meriting further inquiry to confirm or dispel that suspicion. Similar to ***Commonwealth v. Depina***, 456 Mass. 238 (2010), the description of the perpetrators, together with the spatial and temporal proximity of the defendant and his companion to the scene of the home invasion, the defendant's twice reversing direction and running away upon encountering the police, and the gravity of the crime under investigation gave rise to a reasonable suspicion justified the stop of the defendant. Additionally, there was "independent police corroboration of the report of the criminal activity, and the 'characteristics of the place of the suspected criminal activity (including whether it is a high crime area)' also support the inference the officer drew." Based on all these factors the majority denied the motion to suppress.

- **TRAINING TIP:** The dissent found the description in this case TOO GENERAL to connect the defendant to the crime. Although one of the victims recalled that one of the suspects was wearing a red sweatshirt or carrying a backpack full of stolen goods, this detail was no specific enough to connect the defendants to the crime. Additionally, the defendants' flight or evasive behavior was insufficient to establish reasonable suspicion for a threshold inquiry. The reason why such behavior does not satisfy the test for reasonable suspicion is that it is not sufficiently probative of whether a crime was, is, or is about to be committed.

- **ADDITIONAL CRITICAL POINT:** "What ultimately divided the panel was the significance of this latter-described evasive action." When the officer said stop, his language was a command to stop not a request and that is a seizure pursuant to the Massachusetts Declaration of Rights. "Stopping any two black men walking on the street wearing hoodies simply because thirty minutes earlier and one mile away two black men in dark clothing, at least one of whom was wearing a hoodie, were among three men involved in a burglary violates the relationship between law enforcement and the members of communities they are sworn to protect."

Commonwealth v. McKoy 83 Mass. App. Ct. 309, (2013): The Court held that police officers had reasonable suspicion to conduct investigative stop of defendant and his companion, after receiving a report that a person had been shot at a house 100 yards from where defendant and companion were walking; defendant and companion were only people on the street due to poor weather conditions and were walking from direction of house where shooting had been reported, defendant dropped a large item to the ground when asked to remove his hands from his pockets, and companion kept his hand in his pocket prior to fleeing from officers. *The "totality of the circumstances" and good report writing were key factors in this decision.*

Commonwealth v. Lyles, 453 Mass. 811 (2009): The Court in ***Lyles*** held that police acted on a hunch because they lacked reasonable suspicion. In ***Lyles,*** police officers stopped the defendant after they observed the defendant walking on a public sidewalk in an area known for drug activity. Since the officers did not recognize the defendant, they asked for his identification and checked for warrants. As soon as the police took the defendant's identification, a seizure occurred because he was not free to leave until the officers returned his identification and completed their investigation. The defendant in Lyles did not voluntarily provide his identification but only turned it over after the police asked for it.

Commonwealth v. Fraser*,* 410 Mass. 541, 544 (1991): The Court held it was reasonable for officer to ask the man to remove his hands from his pockets because the officer had concern for his safety.

CAMBRIDGE POLICE DEPARTMENT
CAMBRIDGE, MA

INCIDENT # / REPORT #	OFFICER	RANK	REVIEW STATUS
7002684 / 0	BIKOFSKY,STEPHEN	OFF	APPROVED

Arrest Report

INCIDENT #7002684 DATA

As Of 04/13/2007 08:20:23

BASIC INFORMATION

CASE TITLE	LOCATION	APT/UNIT #
WARRANTS AND DRUGS	HANCOCK ST & MASSACHUSETTS AVE	

DATE/TIME REPORTED	DATE/TIME OCCURRED
04/13/2007 06:55:00	[UNSPECIFIED]

INCIDENT TYPE(S)/OFFENSE(S)

(94C/34/D)DRUG, POSSESS CLASS B, [redacted] c94C S34

[NO PERSONS]

OFFENDERS

STATUS	NAME	SEX	RACE
DEFENDANT	WHITE, WILLIAM T	MALE	BLACK

[NO VEHICLES]

PROPERTY

CLASS	DESCRIPTION	MAKE	MODEL	SERIAL #	VALUE

OFFICER REPORT: 7002684 - 0 / BIKOFSKY,STEPHEN (501)

DATE/TIME OF REPORT	TYPE OF REPORT	REVIEW STATUS
04/13/2007 07:36:55	ARREST	APPROVED

NARRATIVE

On the above date and time while assigned to Car 2 with Officer B. Hussey we observed a motor vehicle bearing MA passenger plate [redacted] traveling on Massachusetts Avenue in the Central Sq. area. I entered MA passenger plate [redacted] in the MDT to check the status of the plate. A short time later the status revealed that the plate was active, but the registered owner had 2 outstanding warrants for his arrest. We conducted a motor vehicle stop of this vehicle at the intersection of Massachusetts Avenue and Hancock Street. Officer Hussey made contact with the driver, introduced himself and requested his license and registration. The driver produced a MA

drivers license identifying himself as William T. White with a DOB of [redacted]. We requested that ECC confirm the warrants via channel 2. ECC confirmed the warrants and docket numbers for the warrants using Mr. White's BOP. White was placed under arrest for the warrants. While conducting a pat frisk of Mr. White I found a hard container consistent with the shape of a pill bottle in his right pants pocket. I advised white of his Miranda rights and asked what was in the bottle, White replied that it was his high blood pressure medicine. I removed the container and observed that it was a black one touch ultra glucose testing bottle. I opened the bottle and observed 6 white round pills bearing the numbers 54142. I took possession of the pills pending identification of them. White also had a prescription bottle on his person with medication for high blood pressure, this bottle contained 1 pill. White's motor vehicle was parked in a metered parking spot on Massachusetts Ave, I asked if he wanted me to secure the motor vehicle where it was or tow it. White indicated that he would like the vehicle secured where it was.

Officer B. Hussey entered the motor vehicle to secure the keys from the ignition. While Officer Hussey was securing the motor vehicle, he observed on the front passengers seat in plain view another unlabeled prescription bottle containing white pills. The bottle was removed and brought to Police HQ pending identification of the pills.

Upon arrival at Police HQ the pills in the One Touch bottle that was located in Mr. White's right pants pocket were identified as Methadone Hydrochloride 10mg, this bottle contained 6 pills. The bottle that was seized from the front passenger seat contained similar pills and contained 45 10mg Methadone Hydrochloride pills.

I entered the booking room and again on tape advised Mr. White of his rights and asked what kind of pills he had on his person, he stated high blood pressure pills then paused and stated I do not have to answer that.

[redacted]

In addition to the warrants, White is being charged with possession of Class B [redacted]

The pill bottle and the pills were seized as evidence and tagged delivered to Property Clerk K. Cavanagh, to be held as evidence.

Officer C. Santos booked Mr. White in the usual way and advised him of his charges.

OFFICER SIGNATURES

Reporting Officer: _____ Date: _____

BIKOFSKY,STEPHEN 501

Approving Officer: _____ Date: _____

MCCUSKER,TIMOTHY 396

Revisiting White Jr.

Commonwealth v. White Jr., 469 Mass 96 (2014): Cambridge Police arrested William White for outstanding warrants. During a pat-frisk of White, one officer felt a small, hard object in White's front pants pocket. White informed the officer that the object was a container full of his blood pressure medication. The officer removed the container and saw that it had White's name was on the label and it had one pill inside. The officer felt a similar object, which he removed from White's pocket. The second object was a black opaque plastic **"One Touch"** container. The officer knew that **"One Touch"** containers usually hold thin strips for blood sugar testing kit. When the officer shook the container, he heard a sound that was more consistent with the presence of several pills. The officer opened the **"One Touch"** container and found additional pills that looked different than White's prescription pills. The officer retained the pills for further investigation because he was unfamiliar with the pills.

Before transporting White to the station, the officers retrieved the keys for White's vehicle, and intended to leave it parked on the road. Once inside the vehicle, the officer saw in **plain view** on the front passenger seat an **unlabeled pill container**. The pills inside the **unlabeled pill container** were identical to the pills in the **"One Touch"** container. The officer retrieved the pills and used the internet to identify the pills as ten-milligram methadone pills. White was charged with illegal possession of a class B substance, in violation of M. G. L. c. 94C, § 34 because he did not have a prescription for the methadone pills. White filed motion to suppress the evidence which was denied and after he was convicted of illegal possession of methadone, he filed an appeal. The SJC heard the case and vacated White's conviction. Three key issues came up during the appeal, the limitations of search incident to arrest, inventory searches and plain view.

1st Issue: Did the police exceed the scope of the search incident to the arrest?

The SJC found that the officers exceeded the scope of the search incident to arrest when they opened the pill container seized from White. According to M.G.L. c. 276, § 1, the police are authorized to conduct a **search incident to arrest** for the following reasons:

> (1) to seize evidence of the crime for which the arrest has been made in order to prevent its destruction or concealment or;
>
> (2) to remove any weapon the person arrested might use to resist arrest or to escape. ***Commonwealth v. Wilson,*** 389 Mass. 115, 118 (1983).

Here, the SJC held that the police were permitted to conduct a pat-frisk of White for weapons, but conducting a search incident to arrest for the purpose of seizing contraband or evidence related to the prior crimes of arrest was unreasonable. The police were arresting White on outstanding warrants and had no reason to believe that any contraband or evidence recovered would be connected to those prior crimes. The lawful scope of the search incident to arrest in this case should have been limited to a search for weapons that White may use to resist arrest or escape, or objects that might be used as a weapon. See ***Commonwealth v. Clermy***, 421 Mass. 325, 328-329 (1995) (where defendant arrested on outstanding motor vehicle default warrant, search incident to arrest limited to search for weapons). It was certainly reasonable for the police to conduct a pat-frisk of White for possible weapons.

However, once the officer shook the **"One Touch"** container and verified that it contained only pills and not a weapon, the officer was not authorized under G. L. c. 276, § 1, to open the container because its contents reasonably could not be contraband or other evidence "of the crime for which the arrest" was made.

2nd Issue: Could the "One Touch" container be opened pursuant to the inventory policy in Cambridge?

The SJC concluded that the inventory policy of the Cambridge Police Department allowed the officers to search the **"One Touch"** container because it provides that "any container or article found on the arrestee's person . . . will be opened and its contents inventoried." See ***Commonwealth v. Vuthy Seng***, 436 Mass. 537, 550, cert. denied, 537 U.S. 942 (2002) ("It is clear that, before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person, including even those within a container"); ***Commonwealth v. Bishop,*** 402 Mass. 449, 451 (1988) (inventory search lawful under art. 14 of Massachusetts Declaration of Rights where conducted pursuant to standard, written police procedures).

Inventory searches "are justified to safeguard the defendant's property, protect the police against later claims of theft or lost property, and keep weapons and contraband from the prison population." ***Vuthy Seng,*** supra at 550-551. "Such inventory searches are intended to be 'noninvestigatory.'" ***Commonwealth v. Alvarado***, 420 Mass. 542, 553 (1995). One of the officers who was not the booking officer examined the seized pills from the container solely for an investigative rather than an inventory purpose by using the number imprinted on the pills to identify them on an Internet Web site. The investigative use of these pills transformed a lawful inventory seizure of the pills into an unlawful investigatory search of the pills. *The SJC emphasized that "police may not hunt for information by sifting and reading materials taken from an arrestee which do not so declare themselves"* ***Commonwealth v. Sullo,*** 26 Mass. App. Ct. 766, 770 (1989). The pills recovered from the **"One Touch"** container should have been suppressed even though the container was lawfully seized pursuant to the inventory policy**.** *Once the officer commenced an investigation via an Internet search, a search warrant was required*.

3rd Issue: Did the police justifiably seize the unlabeled pill container in plain view?

Although the **unlabeled pill container** was lawfully seized under the **plain view doctrine**, searching the inside of the container was unlawful. Under the **plain view doctrine**, a police officer may seize objects in plain view where four requirements are met:

(1) the officer is "lawfully in a position to view the object";

(2) the officer has "a lawful right of access to the object";

(3) with respect to "contraband, weapons, or other items illegally possessed, where the incriminating character of the object is immediately apparent" or, with respect to "other types of evidence ('mere evidence'), where the particular evidence is plausibly related to criminal activity of which the police are already aware"; and

(4) the officer "come[s] across the object inadvertently." ***Commonwealth v. Sliech-Brodeur,*** 457 Mass. 300, 306-307 (2010)

Here, the first, second, and fourth requirements were met, but not the third. *It was not "immediately apparent" that the pills in the* ***unlabeled pill container*** *were contraband until the officer conducted an Internet search*. Since the "warrantless seizure of the pills in the **unlabeled pill container** was not lawfully authorized under the **plain view doctrine**," the pills should have been suppressed**.**

- **TRAINING TIP:** The key issue in ***White*** involved the officer's process of identifying the pills via the internet. Since it was not immediately apparent that the pills were contraband, the SJC concluded that searching on the internet for identification was impermissible. One alternative may be to post as bulletin in the police station of common pills that officers may encounter on the street. ***White*** does not prohibit police from conducting probable cause searches or searches with a warrant.

The Hypothetical below is used to demonstrate some options police have when dealing with street encounters involving drug transactions. Please consult with your legal advisor, police chief or local district attorney's office for further guidance concerning the application of these hypotheticals related to your Departmental policy.

HYPOTHETICAL 1: Zack Riley had an active arrest warrant for a past domestic assault and battery. Lancaster police had been looking for Zack Riley for the past two days and Officer Snow who was on patrol downtown saw him walking downtown. Officer Snow knew Zack Riley was a drug user and had a prior criminal record for a variety of drug offenses. Officer Snow approached Zack Riley and placed him under him under arrest. Officer Snow conducted a pat-frisk of Zack Riley for weapons. As Officer Snow was patting the outside of Zack's pants he felt a hard bulge around his waist and discovered a fanny pack. Officer Snow felt the outside of the pack and determined that there seemed to be a long object that could possibly be a knife and maybe a pill bottle. Officer Snow opened the fanny pack and found some hypodermic needles, an unlabeled pill box and a long knife that appeared to be a cutting agent. Lancaster Police Policy allows unlocked containers to be opened. Officer Snow was a seasoned narcotics detective and when he shook the bottle he heard what sounded like pills that Zack had no prescription. Can Officer Snow seize the pills and conduct a search on the internet when he returns to the station?

Answer: No, this hypothetical shadows the ***White*** case and again the concern becomes the search the internet to identify the pills.

Drug Transactions

Factors for Drug Searches:

1. An Area known for drug activity
2. Unusual nature of transaction (short walk, meaningless ride)
3. Furtive movements of participants
4. Experience and training of police

There are a number of factors that police can rely upon when establishing probable cause that a drug transaction has occurred.

Commonwealth v. Freeman, 87 Mass. App. Ct. 448, (2015): Detective Brian Hussey, an experienced narcotics investigator, was conducting surveillance with his partner, in an area of Cambridge that had an increase of drug activity. The location was a densely populated residential area with numerous small businesses and parks. Detective Hussey initially observed two men, standing next to each other on the corner of Magazine and Prince Streets, counting paper money.

Detective Hussey recognized one of the men as a drug user. The other man was unknown to the police. The officers observed the two men walk two blocks and then separate. The unidentified man turned and walked past police who were sitting in the surveillance vehicle. Detective Hussey next observed another male (later identified as the defendant) walking towards the unidentified man the detective had been following. The two men met and began talking to each other. They then turned and began walking side-by-side in the direction of Detective Hussey. While the two men stood in the middle of Fairmont Street, Detective Hussey, who was standing about forty to fifty feet away, observed the unidentified man hand what appeared to be unfolded money to the defendant, who passed an object, small enough to fit in the palm of a hand, to the unidentified man. The men parted and went in opposite directions after the exchange was completed. The unidentified man walked away and was not apprehended. The defendant was counting paper money as he walked in the direction of Detective Hussey who informed him he was conducting a drug investigation. The defendant raised his hands and, his cellular telephone dropped. He was then handcuffed and placed under arrest.

The defendant was read the Miranda rights and stated that he understood them. A pat-frisk followed, which uncovered a black pouch hidden in the area of the defendant's crotch containing eight individual paper folds of heroin. The defendant also made a number of statements to the police, including his denial of meeting up with anyone and his admission that he had "dope" on him. The defendant filed a motion to suppress the evidence found on him and the statements he made. The motion judge allowed the motion to suppress after comparing the circumstances in this case to ***Clark*** and ***Ellis***.

In ***Commonwealth v. Clark***, 65 Mass. App. Ct. 39, 836 N.E.2d 512 (2005), the Court found that an exchange between two unknown individuals of a small object for money on a public street, standing alone, amounts to no more than a hunch that a crime had been committed, and "does not amount to reasonable suspicion." Similarly, in **Commonwealth v.**

Ellis, 12 Mass. App. Ct. 476, 426 N.E.2d 172 (1981), the Court determined that a police officer lacked justification to stop a motor vehicle after he observed several people conversing through the window of the vehicle while it was in a parking lot, one of the individuals passing some paper money into the vehicle, and one of the occupants of the vehicle giving something to this individual. The Commonwealth appealed the motion judge's findings and the Appeals Court heard the case.

Conclusion: The Court reversed and denied the motion to suppress.

1st Issue: Was there probable cause?

The Court distinguished this case from ***Ellis*** and **Clark**. First, Detective Hussey did not commence with his observation of a hand-to-hand exchange, but included the observation he made minutes earlier and near the location where this exchange took place, of one of the men involved in this exchange meeting with another person who was known to the police as a drug user. This initial observation also included the two men counting money. An additional consideration that weighs in favor of probable cause is that the area in which these events unfolded was not described by the police simply in generic terms as a "high crime" or a "high drug" location. See ***Commonwealth v. Cheek***, 413 Mass. 492, 496-497, (1992). Detective Hussey testified that while he did not have personal knowledge of drug activity in the area where these events took place, he knew that the police had recently received, and had investigated, ten to fifteen complaints of increased drug activity.

Furthermore "within a month or two prior to that day of the exchange, roughly 10-15 anonymous complaints of increased drug activity in that area had been received." While Detective Hussey, did not have specific details of a planned drug transaction in a specified location, there was more than a dozen recent reports of "increased drug activity," even if anonymous, are sufficient to contribute to the circumstantial evidence that a drug transaction had occurred. The fact of this case "fits within the framework of those decisions in which the Supreme Judicial Court has assessed whether the 'silent movie' observed by an experienced narcotics investigator reveals a sequence of activity consistent with a drug sale. See ***Commonwealth v. Santaliz***, 413 Mass. 238, 242, 596 N.E.2d 337 (1992); ***Commonwealth v. Kennedy***, 426 Mass. 703, 708-711, 690 N.E.2d 436 (1998); ***Commonwealth v. Levy,*** 459 Mass. 1010, 1011-1012, 947 N.E.2d 542 (2011); ***Commonwealth v. Stewart***, 469 Mass. 257, 262-263, 13 N.E.3d 981 (2014).

Comparing this case to ***Santaliz,*** the SJC regarded four factors as significant in contributing to the existence of probable cause:

(1) **"the unusual nature of the transaction";** Detective Hussey's observations of two men counting money, one of whom then walks away a short distance while talking on a cellular telephone and meets with another man, the defendant, who hands over an object small enough to fit in the palm of one hand in exchange for paper currency, qualifies as "unusual" as that term is used in **Santaliz, supra**.

(2) **"the furtive actions of the participants";** Here, the object exchanged between the defendant and the unidentified male was so small and handed over so quickly that it

could not be identified, and as soon as the exchange occurred, the two men separated and walked away in opposite directions. This conduct supplies an objective basis for the officer to view it as "furtive" as contrasted with what one court has described as police characterizations of behavior as furtive that consist of no more than "subjective, promiscuous appeals to an ineffable intuition." ***United States v. Broomfield***, 417 F.3d 654, 655 (7th Cir. 2005).

(3) **the encounter occurred in a location associated with drug activity**; Detective Hussey testified that there was an "increase" of drug activity in the area and that there had been ten to fifteen reports of drug transactions within a month or two of the night in question is significant. "A tip, 'even though not by itself qualifying under ***Aguilar v. Texas*,** 378 U.S. 108, 84 S. Ct. 1509, (1964), may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause.'" ***Commonwealth v. Saleh,*** 396 Mass. 406, 411, 486 N.E.2d 706 (1985). The motion judge credited Detective Hussey's testimony about increased drug activity but without more specifics he did not find it was sufficient to establish probable cause or even reasonable suspicion that a particular encounter involves a hand-to-hand drug transaction, such reports do supply a context on which an experienced narcotics investigator can rely in interpreting events that might otherwise seem innocuous or coincidental.

(4) **an experienced drug investigator "considered the events as revealing a drug sale";** Detective Hussey, who had experience and specialized training in street-level drug transactions, was assigned to a specialized drug investigation unit, and was conducting surveillance where the encounters took place, considered the nature of the exchange and the departure of the two men immediately thereafter as indicative of a street-level drug transaction.

The Court further held that "in dealing with probable cause ... we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Brinegar v. United States***, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). "The officers must have entertained rationally 'more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt." ***Commonwealth v. Rivera*,** 27 Mass. App. Ct. 41, 45, 534 N.E.2d 24 (1989).

The essence of probable cause is a reasonable, objective basis that would lead a person of ordinary prudence to believe a crime has been, is being, or is about to be committed. See ***Santaliz*,** *supra* at 241. While there could have been an innocent explanation for the events observed by Detective Hussey, he was entitled to view them through the lens of his specialized training and experience and conclude that more than mere coincidence was involved, and that he had witnessed a drug transaction.

Search Incident to Arrest

Police are not required to see an actual object or money exchanged or that the location of the transaction be a high crime area to have reasonable suspicion a drug transaction occurred!

Commonwealth v. Luttenberger, 87 Mass App. Ct., 1127 (2015): Great Barrington Police Officer Jason LaForest was in uniform, on bike patrol. In the area of Cumberland Farms parking lot because there had been numerous complaints regarding drug transactions and drug and alcohol use. Officer LaForest observed large group of people gathering in the store's parking lot and he heard Evan Cabaniol ask the defendant, "Do you have it?" or "You got it?"

At that point, the defendant and Cabaniol walked away from the large group, and each removed and unzipped their respective backpacks, took something from within their backpacks, and engaged in what appeared to be a hand-to-hand drug transaction. Although Officer LaForest could not see whether drugs were exchanged, he approached the defendant and Cabaniol and asked them to sit on the curb. Cabaniol was a known heroin user and Officer LaForest had intercepted Cabaniol selling heroin to a police informant. Three officers responded to assist and one of them had previously arrested Cabaniol for drug-related offenses. The officers first searched Cabaniol and seized a hypodermic needle. Officer LaForest released Cabaniol.

After releasing Cabaniol, the officers searched the defendant's backpack and seized marijuana, a digital scale, $369 in cash, a bottle of vodka, and sandwich baggies. The officers found a hydrocodone pill on the defendant's person. The defendant was charged and a motion to suppress was filed in District Court. The motion judge concluded that the police lacked probable cause to search the defendant's backpack as a search incident to arrest. The Appeals Court heard the case.

Conclusion: The Appeals Court reversed the findings of the motion judge and denied the motion to suppress.

1st Issue: Was there probable cause to search the defendant's backpack?

The motion hearing judge concluded that even if there had been probable cause to arrest there was no probable cause to search the defendant's backpack because police had released Cabaniol. A proper search incident to an arrest requires that the arrest itself must be lawful, which means that it must be based on probable cause. The search may precede the formal arrest, provided probable cause to arrest exists at the time the search is made and provided that probable cause to arrest exists independent of the results of the search. See ***Commonwealth v. Santiago***, 410 Mass. 737, 742, (1991); ***Commonwealth v. Johnson*****,** 413 Mass. 598, 602 (1992).

After review, the Court determined that probable cause to arrest the defendant and Cabaniol existed before the search. See ***Commonwealth* v. *Mantinez*****,** 44 Mass. App. Ct. 513, 515, 692 N.E.2d 92 (1998) (motion to suppress properly denied because probable cause existed before search). Contrary to the defendant's argument, the fact that Cabaniol was not

arrested does not negate the probable cause to arrest before the police searched the defendant's backpack. The treatment of Cabaniol does not change the objective nature of the inquiry with regard to the defendant. "Probable cause to arrest exists when, at the moment of arrest, the facts and circumstances known to the police officers were sufficient to warrant a person of reasonable caution in believing that the defendant had committed or was committing a crime." ***Commonwealth v. Gullick***, 386 Mass. 278, 283, 435 N.E.2d 348 (1982), citing ***Beck v. Ohio***, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); ***Michigan v. DeFillippo***, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

The Supreme Judicial Court has held that certain factors, when considered together, could establish probable cause that the defendant had engaged in a hand-to-hand drug transaction:

(1) "the furtive actions of the participants";

(2) the location is "known to the police as a place of high incidence of drug traffic"; and

(3) the witnessing of the event by an experienced officer, who "considered the event as revealing a drug sale."

Commonwealth v. Santaliz, 413 Mass. 238, 241, 596 N.E.2d 337 (1992). See ***Commonwealth v. Kennedy***, 426 Mass. 703, 708, 690 N.E.2d 436 (1998).

Here, Officer LaForest's observations coupled with his training and experience gave him reasonable inference that a hand-to-hand drug transaction had occurred. The factors that the Court credited are listed below:

(1) Officer LaForest's prior interactions with Cabaniol as both a drug user and a drug dealer;

(2) the defendant and Cabaniol acted furtively by walking away from the large group to conduct their transaction, after Cabaniol asked the defendant, "Do you have it?";

(3) the Great Barrington police received complaints from Cumberland Farms store employees and other individuals about the drug transactions and alcohol use in the parking lot of the store; and

(4) Officer LaForest believed that a drug transaction had occurred.

There is no requirement that an officer see an actual object or money exchanged or that the location of the transaction be a high crime area. Rather, an officer's knowledge of the involved parties' drug use, the defendant's reputation as a drug dealer, and the officer's observations of the defendant's interaction with others were sufficient to establish probable cause. Based on the aggregate of these factors, it was sufficient to establish probable cause that a crime had been committed or was in the process of being committed before an arrest was made. The officers had probable cause to arrest and could have arrested the defendant before conducting the search of his backpack and therefore the search of the backpack was justified.

Commonwealth v. Evans, 87 Mass App. Ct., 687 (2015): The Court held that the defendant was not seized when the police questioned him on the street. The encounter evolved into a seizure when the police approached him and asked what was in his mouth. The second issue the Appeals Court considered was whether the police had reasonable suspicion to believe the defendant was involved in criminal activity and the Appeals Court found that they did not have reasonable suspicion.

1st Issue: When was the defendant seized?

The timing of when the police approached the defendant is crucial in determining when the defendant was seized. See ***Commonwealth v. DePeiza***, 449 mass. 367 (2007). The Appeals Court considered the facts surrounding the encounter and evaluated "whether a reasonable person believe he was free to turn his back on the interrogator and walk away." The Appeals Court determined that a reasonable person would not have felt free to leave when the police asked the defendant to open his mouth. The police officers testified that the encounter occurred on the street around 11:30 pm in the dark. The officer had to use a flashlight to see inside of the defendant's mouth. Even though one of the officers had asked the defendant to remove his hands from his pocket, the encounter did not evolve into a seizure until the defendant was directed to open his mouth.

2nd Issue: Did the police have reasonable suspicion to stop the defendant?

The Appeals Court determined that he police lacked reasonable suspicion to stop the defendant. The factors the Appeals Court considered are listed below:

1. Officers were on routine patrol with no report that there was a disturbance or issue in the area.

2. The officers did not have any prior interactions with the defendant.

3. The officer questioned the defendant where he was heading, and he informed them that he was returning home. During the motion hearing, the police admitted that had no reason to question the defendant about.

4. The defendant's nervous demeanor did not signify he was involved in a crime. Although he hesitated when police asked him to remove his hands from his pockets, he complied. The Courts have previously held that "a defendant's nervous movements or appearance alone is insufficient," to create reasonable suspicion. See ***Commonwealth v. Brown***, 75 Mass. App. Ct. 474 (1993).

5. Police needed a flashlight to see inside of the defendant's mouth.

After examining these factors separately and together, the Appeals Court concluded that the police lacked reasonable suspicion to seize the defendant. As a result, any evidence seized must be suppressed as "fruit of the poisonous tree."

Searching Hotel Registries

Massachusetts Law Regarding Hotel Registries: Massachusetts requires that hotel administrators maintain a registry of names of hotel guests and to produce this information to law enforcement upon request.

G.L. 140 § 27: Register; entry of names; condition precedent to occupancy; retention; inspection; penalty:

> **Every innholder, and every lodging house keeper required so to do under section twenty-eight, and every person who shall conduct, control, manage or operate, directly or indirectly, any recreational camp, overnight camp or cabin, motel or manufactured housing community shall keep or cause to be kept, in permanent form, a register in which shall be recorded the true name or name in ordinary use and the residence of every person engaging or occupying a private room averaging less than four hundred square feet floor area, excepting a private dining room not containing a bed or couch, or opening into a room containing a bed or couch, for any period of the day or night in any part of the premises controlled by the licensee, together with a true and accurate record of the room assigned to such person and of the day and hour when such room is assigned. The entry of the names of the person engaging a room and of the occupants of said room shall be made by said person engaging said room or by an occupant thereof, except that when five or more members of a business, fraternal, or social group or other group having a common interest are engaging rooms, they may designate one person to make said entry on their behalf and prior to occupancy. Until the entry of such name and the record of the room has been made, such person shall not be allowed to occupy privately any room upon the licensed premises. Such register shall be retained by the holder of the license for a period of at least one year after the date of the last entry therein, and shall be open to the inspection of the licensing authorities, their agents and the police. Whoever violates any provision of this section shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not more than three months, or both.**

In 1986, the above statute was challenged where a motel owner refused to turn over records to a state trooper who did not have a warrant. The SJC heard the case and held that the state law was constitutional under the 4th Amendment and that no search warrant was needed since hotel operators do not have a reasonable expectation of privacy in the registry. ***Commonwealth v. Blinn,*** 399 Mass. 126 (1987). The SJC emphasized that a motel is a business not a home and therefore it is not unlawful for the state to require that a registry of guest names be kept.

Recently, the Supreme Court held in ***City of Los Angeles v. Patel***, that a city ordinance was unconstitutional because it required hotel owners provide police with all the information contain within a hotel registry without a warrant. Hotel owners can were not allowed to have a pre-compliance review under this ordinance. Although this case went to the Supreme Court, it has not nullified Massachusetts statute. The Massachusetts statute differs from the Los Angeles ordinance because it only requires that the name of the guest. The ordinance in Los Angeles required more extensive information that included the names of guests, identification numbers, vehicle registration information, and credit card/financial information as well. In light of the Supreme Court decision, Massachusetts may need to revisit

its legislation to make sure it is compliant. It is important to note that Massachusetts **never addressed** whether the hotel owners have a right to privacy if the records were designated as private property.

City of Los Angeles v. Patel, U.S. Supreme Court, No.13-1175 (2015): In 2003, the respondents, a group of motel operators along with a lodging association, sued the city of Los Angeles in three consolidated cases challenging the constitutionality of city ordinance§41.49(3)(a), which required "**every operator of a hotel to keep a record**" containing specified information concerning guests. The record must be "available to any officer of the Los Angeles Police Department for inspection" on demand. The Los Angeles Municipal Code §§41.49(2), (3)(a), (4) (2015) required that hotel records include "guest names and addresses, the number of people in each guest's party, the make, model, and license plate number of any guest's vehicle parked on hotel property, the guest's date and time of arrival and scheduled departure date, the room number assigned to the guest, the rate charged and amount collected for the room; and the method of payment." The hotels were required to maintain a log of guests who stay on the premises for 90 days. If police demand to review these records and hotel operators refuse, they could be charged with a misdemeanor punishable by up to six months in jail or fined $1,000. This ordinance would not apply if there were exigent circumstances.

The City initially prevailed in the lawsuit but the Ninth Circuit determined that a police officer's nonconsensual inspection of hotel records under §41.49(3)(a) was a Fourth Amendment search. The appeal never addressed whether hotel guests had standing to challenge the issue since they would be impacted if their personal information was shared. Rather the appeal focused on whether (1) the hotel had both a privacy interest in its records, as well as a property-based right to exclude others from its property and (2) whether the Fourth Amendment expressly protects "papers" (such as the hotel's business records and registries) as the hotel's private property. The Supreme Court granted certiorari, and examined whether the ordinance was constitutional on both right-to-privacy grounds as well as on the basis of a property owner's right to exclude records from police inspection.

Conclusion: In a 5-4 decision, the Supreme Court held that the ordinance was unconstitutional because it required hotel operators to make their registries available to the police on demand and also because it penalized hotel operators for not turning over these records. The majority "concludes that hotel operators should be permitted to have a neutral decision maker review an officer's demand to search the registry before he or she faces penalties for failing to comply. Actual review need only occur in those rare instances where a hotel operator objects to turning over the registry." Furthermore, the majority regarded holding as narrow and it maintained that it does not alter police from issuing administrative subpoenas without probable cause nor does it prevent police from obtaining access to those records where a hotel operator consents to the search, where the officer has a proper administrative warrant, or where some other exception to the warrant requirement applies.

In its decision, the majority disagreed with the petitioner's argument that the search of hotels and motels is closer to an "administrative search" of a highly regulated industry, and therefore there is a lower expectation of privacy. "Contrary to liquor sales, firearms dealing,

mining or running an automobile junkyard, the majority did not find that hotel industry is intrinsically dangerous and therefore should not be subject to government oversight."

Emergency Aid Exception and Domestic Violence

Parameters of the Emergency Aid Exception in Massachusetts:

Police can enter a home without a warrant if they have a reasonable basis to believe the following:

1. *someone inside is injured or*

2. *is in imminent danger of physical harm*.

Emergency aid does not require police to have probable cause to enter a home because the purpose for entry is not to investigate a crime but to avert danger.

Police can lawfully enter an apartment without a warrant under the emergency aid exception when responding to a domestic violence incident and seize evidence of illegal weapons and drugs found in plain view from that apartment.

Commonwealth v. Gordon, 87 Mass. App. Ct. 322 (2015): Peabody Police received an anonymous 911 call from Paddy Kelly's bar that there was a domestic disturbance in an apartment located in the same building. When police arrived, they went directly to the main entrance of the apartments and knocked on the first floor apartment. Another tenant allowed police inside and told police that she had heard an argument between a male and female along with some "crashing sounds." Police received no response after knocking on the apartment door again. Police spoke with a female bartender at Paddy Kellys after confirming the 911 call originated from the bar. The bartender relayed that she called 911 caller because a woman known as "Kay," had asked her to call police. According to the bartender, "Kay's hair was soaking wet, she was carrying her dog" and her "voice was frantic." She also told police that when she asked Kay whether she was all right, Kay responded "no" and she noted that her shirt looked as though it had been pulled or stretched. Kay "appeared very upset" and the bartender knew she stayed in apartment one on many occasions. The bartender knew a male lived in apartment. Kay left the bar and walked toward the entrance to the apartment building although "no one saw whether Kay returned to apartment one."

The police returned to apartment one and attempted to gain access. The building owner arrived on scene and identified the defendant, James Gordon, as the tenant living in apartment one. Police searched inside the apartment and observed "a frying machine and broken glass, hypodermic needles and a mushroom-growing operation." Police left the apartment when no one was found and later police returned with detectives from the drug unit and two agents from the Bureau of Alcohol, Tobacco and Firearms. The police and agents applied for a search warrant which led to the seizure of firearms, ammunition and drugs.

Gordon was charged and filed a motion to suppress evidence seized as a result of the search warrant. The motion judge concluded that "warrantless entry by police was not justified because no emergency existed when the police entered the apartment. Additionally, the motion judge found that "there was no report of physical violence or demonstration that police had evidence that the Kay was in need of immediate assistance." The judge's findings emphasized that "the alleged victim was clearly over and any emergency had dissipated given the fact that the alleged victim was out of the apartment physically uninjured and safe." The Commonwealth filed an appeal and the Appeals Court heard the case.

Conclusion: The Appeals Court held that the police entry inside without a warrant inside the home was lawful because the police had an objectively reasonable basis to conclude that the person who asked for police assistance may be inside the apartment and in need of emergency aid.

1st Issue: Were police were justified entering the apartment under the emergency aid exception?

The Appeals Court that the police were justified in entering the apartment under the emergency aid exception. Pursuant to the emergency aid exception, police can enter a home without a warrant if they have an objectively reasonable basis to believe that someone may be injured or in imminent danger or harm.

Here the police received a report that there was a domestic disturbance and when they arrived on scent to investigate, they received no response after knocking on the apartment door. A neighbor informed police that he had heard "crashing sounds," and that he had seen a male and female there earlier. Additionally, the bartender who worked in the adjoining bar told police that she called 911 after observing the woman identified as Kay. According to the bartender, Kay was distraught, had "soaking wet hair" along with a "pulled t-shirt." Although the bartender saw Kay leave the bar, she could not verify whether Kay had returned to the apartment. The motion judge concluded that Kay was out of danger and unhurt because she was able to enter the bar and ask the bartender to contact police.

On appeal, the issue concerned whether the failure to locate Kay would suggest that the emergency may not be over. The Appeals Court found that the "police must often make balanced choices and often domestic situations require police to make particularly delicate and difficult judgments quickly." ***Fletcher v. Clinton***, 196 F.3d 41, 50 (1st Cir. 1999). When considering the facts in the present case along with the very strong public policy in this Commonwealth against domestic violence, the police were justified in making a warrantless entry in the apartment under the emergency aid exception." Additionally, because not one could confirm whether Kay had returned to the apartment or whether her boyfriend was nearby, it was reasonable for police to believe Kay still may be in danger.

The Appeals Court compared the circumstances in this case to ***Commonwealth v. Lindsey,*** 72 Mass. App. Ct. at 488-490, where the police were justified in forcing entry into an elderly woman's home after receiving a 911 call that there was an elderly woman trembling and asking for help In ***Lindsey,*** when police arrived, and could not locate the elderly woman, their concern that might be in need of emergency medical assistance inside her home, justified

the police entering without a warrant under the emergency aid exception. ***Id***. at 487. Here the nature of the incident in conjunction with the information they had received when they arrived on scene justified police entering the apartment to find Kay.

The Appeals Court added that "the emergency aid exception is not a broad authorization for the police to make warrantless entries into homes to conduct wellness checks whenever the police have a concern that someone may need assistance. It is a narrow exception to the warrant requirement and only arises when there is an objective basis for the belief that an emergency exists and a person is in need of immediate assistance. **"Evidence that an incident of domestic violence has occurred is not, standing alone, justification for the police to make a warrantless entry into a home to assist the victim."** Since some domestic violence incidents can escalate into a volatile or dangerous situation, "a rapid police response may be the only way to prevent further injury to a victim, to see whether a threat against a victim has been carried out, or to ascertain whether some other grave misfortune has befallen a victim." Because there is a heightened concern with domestic violence cases, when police have reliable information that a particular individual has been the victim of domestic violence, has requested police assistance, has exhibited signs of distress, may be inside an apartment or home, and despite a prompt response to the request for assistance and an effort to knock and announce their presence, the police receive no response, the conditions exist for a warrantless entry under the emergency aid exception."

2nd Issue: Were police justified in charging Gordon with gun and drug offenses after they observed illegal drugs and weapons in plain view when they entered the apartment without a warrant?

The Appeals Court held that since police had "reasonable grounds" to believe an emergency existed, they were justified in conducting a quick search of the apartment for anyone who might be injured or in need of help. When the police observed a number of suspicious items in plain view "including a frying machine and broken glass on the kitchen floor, hypodermic needles and evidence of a mushroom-growing operation," the police applied for a search warrant. Gordon filed a motion to suppress the evidence the police seized from his apartment with a search warrant. Gordon argued that the police did not have legitimate grounds for entering his apartment without a warrant. When police arrived, it was clear that any alleged argument was over and that Kay was unharmed since she was able walk out of the apartment and into the bar. Gordon's motion was allowed.

The Appeals Court disagreed with the motion judge's findings and held that they were not based on the facts presented in the case. By the time police arrived, it was unclear whether Kay was safe. Due to the uncertainty of Kay's whereabouts, the police were justified in entering the apartment under the emergency aid exception and subsequently applying for a search warrant for the illegal items they observed in plain view while inside of Gordon's apartment.

Emergency Aid Exception can Extend to Animals

Commonwealth v. Duncan, 467 Mass 746 (2014): The SJC held that in "appropriate circumstances, animals, like humans, should be afforded the protection of the emergency aid

exception and would allow police "to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm." Despite its findings, the SJC further concluded that this expansion of the *emergency aid exception* does not change "the essential framework for determining when a warrantless police search of the home is permissible under it." Police must adhere to the strict requirements under the emergency aid exception whether dealing with humans or animals. The two key requirements are listed below:

1. An objectively reasonable grounds to believe that an emergency exists

2. Police conduct must be reasonable under the circumstances after gaining entry

Additionally, ***Duncan*** established that some factors that should be considered when determining whether a 'pure emergency' exists for animals. Before entering a home without a warrant to assist animals in need, police should consider the factors listed below:

a. Was the animal's condition caused by human abuse or neglect?
b. What kind of species was the animal in need?
c. What was the nature of the privacy interest at issue?
d. What efforts were made to obtain the consent of the property owner prior to making entry onto the property?
e. How significant was the intrusion and was there any damage done to the property?

There are no definitive guidelines that cover every scenario involving animals but the SJC advised that when determining whether the search is reasonable, it will look at the "totality of the circumstances." Here, the police found two animals deceased and frozen to the ground in the front yard of Duncan's home. Police also noticed that there was no food or water outside and the third dog was whimpering and leashed outside in cold temperatures. All of these factors would suggest that the third dog was in imminent danger based on the conditions that the police found it in.

Hot Pursuit

The SJC held that an officer's warrantless entry into a private home was justified under the exigent circumstances exception because the officer was in *hot pursuit* of an individual suspected of committing a jailable misdemeanor!

Commonwealth v. Jewett, 471 Mass 324 (2015): In 2010, Merrimac police officer Richard Holcroft, was on patrol when he observed a male and female walking to a pickup truck in the parking lot of a bar. Officer Holcroft's attention was shifted when he observed another vehicle speeding in the opposite direction. As Officer Holcroft passed the bar, the pickup truck, which he had previously observed, pulled in front of his vehicle and crossed the fog line. The pickup truck crossed over the double yellow line a few more times and Officer Holcroft activated his cruiser lights. The vehicle did not stop and continued driving and nearly struck a parked motor vehicle. Because Officer Holcroft was concerned that the pickup truck posed a danger to the

lives of other motorists on the way, he activated his lights and sirens. The driver subsequently took a wide left turn onto another street, and did not stop. Officer Holcroft radioed dispatch and he learned that the defendant, Eric Jewett (hereinafter referred to as "Jewett") was the registered owner of the pickup truck. Jewett did not stop until he pulled into an unmarked driveway and Officer Holcroft followed, parking his cruiser in the driveway with both his lights and sirens activated.

Jewett refused to get out of his pickup truck and he would not make eye contact with Officer Holcroft. Jewett opened his garage door and proceeded to drive his pickup truck inside. Officer Holcroft wedged an icepick in the garage door and approached the pickup truck. At this point, a female passenger got out of the truck and entered the basement of the home through a doorway connecting the garage to the house. Jewett slid from the driver's seat to the passenger's seat and began to get out by the side door. Officer Holcroft drew his baton and ordered Jewett to turn around, and because he was being placed under arrest. Jewett ignored the commands and moved towards Officer Holcroft. Officer Holcroft smelled an odor of alcohol coming from Jewett and observed that his eyes were glassy and bloodshot, his speech was thick and slurred, and he was very unsteady on his feet. Officer Holcroft sprayed Jewett twice in the face with pepper spray. Jewett stumbled towards the basement door. After a brief struggle through the basement door and into the backyard, Jewett was eventually apprehended.

Jewett was charged with Operating under the Influence of Alcohol, third offense, resisting arrest, reckless operation of a motor vehicle, failure to stop for policer, and marked lanes violations. Prior to trial, Jewett filed a motion to suppress, arguing that Officer Holcroft's entry into his garage was an unconstitutional search and seizure. The judge denied Jewett's motion and found that probable cause existed along with the exigent circumstances of *hot pursuit*, risk of flight and dissipation of the evidence. A jury convicted Jewett of Operating under the Influence of Alcohol and the charge of third offense was tried in a bench trial. Jewett was convicted and appealed. The SJC transferred Jewett's appeal on motion.

Conclusion: The SJC held that Officer Holcroft was justified entering a private home without a warrant because he was in *hot pursuit* of a suspect who fled whom Officer Holcroft had probable cause to believe had committed a jailable misdemeanor which qualified as an exigent circumstance.

1st Issue: Was there probable cause to charge Jewett with a jailable misdemeanor?

The SJC found that Officer Holcroft had probable cause to arrest Jewett for the charge of misdemeanor of reckless operation. See G. L. c. 90, § 24 (2) (a). Although reckless operation does not fall within G. L. c. 90, § 21, regarding warrantless arrests in traffic cases, common law permits a police officer to arrest an individual without a warrant for a misdemeanor if the individual's actions:

(1) constitute a breach of the peace,

(2) were committed in the presence or view of the officer, and

(3) were still continuing at the time of the arrest or are only interrupted so that the offense and the arrest form parts of one transaction. ***Commonwealth v. Howe***, 405 Mass. 332.

Here, the motion judge found that Jewett's erratic operation and near collision into a parked vehicle in front of Officer Holcroft constituted a breach of the peace. Additionally, Jewett failed to stop his vehicle and continued driving through residential streets even though Officer Holcroft had activated his lights and sirens. All of these factors established that Jewett's behavior may have endangered the lives of the public. "The statute *only* requires proof that the defendant's conduct might have endangered the safety of the public, not that it in fact did." See ***Commonwealth v. Constantino***, 443 Mass. 521, 526-527 (2005) ("person may operate a vehicle in such a way that would endanger the public although no other person is on the street"). Moreover, "it is not the duration of negligent operation or the proximity of the public but 'the operation of the vehicle itself that is the crime.'" ***Id.*** at 526. Based on all these factors, the SJC determined Officer Holcroft had probable cause to arrest Jewett for the charge of reckless operation. Since Officer Holcroft had probable cause to arrest Jewett for reckless operation, the SJC did not address whether the officer's observations of Jewett would have amounted to probable cause to arrest him for OUI and justify the warrantless entry into the private home.

2nd Issue: Does the *hot pursuit* exception apply when it involves misdemeanors?

The SJC determined that the *hot pursuit* exception can justify a warrantless entry into a home when involving jailable misdemeanors. Federal and state courts have been divided on the issue as to whether a police officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in *hot pursuit* of the suspect. Jewett contended that the *hot pursuit* exception did not apply to "minor crimes," but only to felonies. The SJC disagreed and found that the "*hot pursuit* exception has never explicitly been limited to felonies under either the Fourth Amendment or article 14 of the Declaration of Massachusetts.

According to the SJC, the Supreme Court in ***Welsh v. Wisconsin***, 466 U.S. 740 (1984), and ***United States v. Santana***, 427 U.S. 38 (1976), established that police may not make a hot pursuit warrantless entry into a residence of a person who is suspected of committing only a minor offense. Here, Jewett was not suspected of committing a "minor offense," but one which was punishable by imprisonment of up to two years. Jewett argued that every misdemeanor should be designated as a "minor offense." However, the SJC held that the *hot pursuit* of an individual suspected of committing a jailable misdemeanor is permissible.

Lastly, the SJC discussed possible issues about "establishing a bright-line rule prohibiting the warrantless entry of a home when the underlying offense is of lesser magnitude than a felony would send an unacceptable message to the defendant who drinks and drives that a *hot pursuit* or an arrest set in motion can be thwarted by beating police to one's door." The SJC further stated that, "law enforcement is not a child's game of prisoner's base, or a contest, with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot." If the *hot pursuit* exception were only limited to felonies, the SJC said it could allow some perpetrators of serious misdemeanors to avoid punishment merely because

of how the legislature had labeled an infraction, which would defy public policy. "Rather, limiting the *hot pursuit* exception to felonies and jailable misdemeanors appropriately balances the constitutional protections of both the Fourth Amendment and art. 14 with society's interest in apprehending individuals suspected of serious crimes."

Officer Holcroft's actions of entering the garage to arrest Jewett were lawful as well as his entry into the private home in pursuit of Jewett. Officer Holcroft had previously attempted to conduct a threshold inquiry of Jewett in a "public setting multiple times," but Jewett failed to comply. The SJC found that depending on the circumstances, that a police officer can enter a private home when in *hot pursuit* of a suspect that the officer has probable cause to believe he committed a jailable misdemeanor.

- **TRAINING TIP: *Jewett*** clarifies that the hot pursuit exception is not restricted to only felonies. The SJC found that the hot pursuit of an individual suspected of committing a jailable misdemeanor is permissible depending on the circumstances of the case.

Additionally, ***Jewett*** highlights the requirements for proving Operating Under the Influence of Alcohol. The SJC ruled that ***Jewett*** "bore many of the classic indicia of impairment," including:

- departing from a bar late in the evening;
- driving erratically, weaving and crossing lane markings, making overly wide turns, nearly striking a parked vehicle, and refusing to comply with police demands to stop;
- Jewett was unsteady on his feet, had bloodshot and glassy eyes, smelled of alcohol, and slurred his words;
- After Jewett fled his home, he attempted to hide behind a small tree and fought with the apprehending officers;
- After being arrested, Jewett fell asleep and snored during booking.

Commonwealth v. Snell, 428 Mass 766 (1999): As mentioned previously, in order for the police to gain entry into a home without a warrant under the **emergency aid exception**, police must have a reasonable belief that someone is injured or in grave danger and once inside police conduct must be reasonable under the circumstances. The emergency aid exception still remains a narrow exception to the warrant requirement.

Anonymous Tips

Firsthand observations coupled with police corroboration can be sufficient to establish reliability of a 911 caller!

Commonwealth v. Depiero, 87 Mass. App. Ct., 105 (2015): Police received a 911 call from an unidentified man stating that "you got a drunk driver on Memorial Drive near Harvard Square and I've got his license number, but he's swerving all over the road." The dispatcher

issued a broadcast with a description of the vehicle, its license plate and the location of where it was driving along with information that included who the registered owner was and the owner's address. The dispatcher also relayed that the owner was on probation for a prior drunk driving offense. A state trooper on patrol in the area heard the broadcast and observed a vehicle matching the description pass him and pull into the driveway. Although the trooper did not observe any erratic driving, he parked his cruiser behind the Depeiro's vehicle with his emergency lights on. Depiero stepped out of his vehicle and nearly fell to the ground. When Trooper Dwyer noticed that Depiero's hair was "wild and unkept" and smelled an odor of alcohol. Depiero was able to produce his license and registration and he told Trooper Dwyer that he was coming from Soldier's Field Road in Cambridge. Depiero also admitted that he had consumed one to two drinks. Trooper Dwyer arrested Depiero for operating a motor vehicle while under the influence of alcohol after he failed the field sobriety tests. Depiero filed a motion to suppress arguing that the anonymous call was unreliable.

The judge denied the motion and concluded that even though the 911 call was placed by "an ordinary citizen and not an informant, the citizen provided detailed information that would indicate the citizen had witnessed firsthand a motor vehicle driving erratically on the roadway." Thus, even though the caller was not identified -- or identifiable -- the motion judge implicitly reasoned that the tip bore adequate indicia of reliability, because the caller's report was based on his personal knowledge, and the information he provided could be accorded more weight than information from an (anonymous) informant as a result of his status as an ordinary citizen. Additionally, the motion judge also found that the information provided by the caller had been corroborated by the police and therefore the stop was lawful because it was supported by reasonable suspicion. Depiero appealed the motion judge's findings.

Conclusion: The Appeals Court upheld the denial of the motion to suppress and concluded that the trooper had reasonable suspicion to stop Depiero's vehicle and it was lawful. The two issues that the Court considered whether the caller was reliable and second whether the call satisfied *Aguliar-Spinelli*. Pursuant to the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, the police establish reasonable suspicion when they are able to provide specific, articulable facts and reasonable inferences therefrom, that [the operator] of the . . . motor vehicle had committed, was committing, or was about to commit a crime." ***Commonwealth v. Alvarado***, 423 Mass. 266, 268 (1996).

1st Issue: Was the anonymous caller reliable?

The Court held that the information provided to police was reliable even though the caller was anonymous. In determining the reliability of the caller, the Court considered whether the information satisfied the basis of knowledge test and the veracity test. Pursuant to the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights, reasonable suspicion is established when police are able to show that they had specific and articulable facts that lead them to infer a person has committed, was committing, or was about to commit a crime." ***Commonwealth v. Alvarado***, 423 Mass. 266, 268 (1996). Information from an anonymous 911 call may warrant reasonable suspicion if it is shown to be reliable. Massachusetts applies the *Aguilar-Spinelli* test to determine whether an anonymous tip is reliable. See ***Commonwealth v. Costa***, 448 Mass. 510, 515 n.9 (2007).

There was no question in the present case that the dispatcher described the motor vehicle with sufficient particularity that enabled Trooper Dwyer to be certain that the vehicle he stopped was the same one identified by the caller. The dispatcher also identified the vehicle's color, make, license plate number, and the address of the registered owner. See ***Commonwealth v. Anderson***, supra at 621. Based on the caller's account of what he had witnessed, the Court determined that the basis of knowledge prong was satisfied. See ***Commonwealth v. Lubiejewski***, 49 Mass. App. Ct. 212, 214 (2000) (basis of the caller's knowledge properly was inferred from the report itself, which indicated firsthand observation of erratic operation). Similarly, the Court in ***Costa*** held that the basis of knowledge test satisfied where caller claiming to be in close proximity to suspect carrying concealed handgun provided suspect's location and described suspect's clothing in full. ***Commonwealth v. Costa***, *supra* at 518. The absence of details such as the caller's location, the Court may question caller's reliability if the caller fails to provide information that would be ascertained from personal observation. See ***Commonwealth v. Gomes***, 75 Mass. App. Ct. 791, 792, 795 (2009).

The second factor for determining the caller's reliability concerned the caller's veracity. Although the initial 911 call was recorded, no evidence was presented to establish that the caller was identifiable or that the caller knew his phone number could be traced. Depiero argued that there are numerous cases that have found a caller is unreliable when there is no evidence presented demonstrating that the caller's anonymity was at risk. See ***Commonwealth v. Mubdi***, supra at 397 (where the Commonwealth failed to establish unidentified caller's reliability where there was "no reason to believe the caller needed to fear that he or she would be subject to a charge of filing a false report or any comparable consequence of providing false information to law enforcement.") Despite the absence of evidence that the caller's anonymity was at risk the Court found that the caller was still reliable.

Trooper Dwyer's observations and investigation of the information provided by 911 added to the caller's reliability. A caller's reliability can be established by demonstrating that the caller witnessed a startling or shocking event, or that the description of the event was made so quickly in reaction to the event it would be unlikely the caller was falsifying the description or was carrying out a plan falsely to accuse another." ***Id***. at 624. Although Trooper Dwyer's did not observe any suspicious behavior, his observations did corroborate some of the information provided by the 911 caller. The Court found that with some corroboration along with the 911 call, it can be inferred that the caller witnessed apparent criminal activity, namely driving while intoxicated, and therefore, the caller was under the stress or excitement of a "startling or shocking event." ***Commonwealth v. Depina,*** 456 Mass. 238, 244 (2010).

Similarly, the Court in ***Anderson*** compared a 911 call to an excited utterance and held that the startling nature of call can enhance reliability. In ***Anderson***, an anonymous caller reported observing two men commit a robbery and escape. Since there was no independent corroboration in ***Anderson,*** the Court applied a "less rigorous veracity test" for reasonable suspicion because the call was made immediately after the startling event." ***Id***. at 625. In the present case, the threat of immediate serious physical injury from a drunk driver is such

that the call at issue was "spontaneous to a degree which reasonably negated premeditation or possible fabrication." ***Commonwealth v. Anderson***, *supra* at 624, quoting from ***Commonwealth v. Depina***, 456 Mass. at 244.

2nd Issue: Did the police have reasonable suspicion to stop Depiero's motor vehicle?

After the Court determined that the caller's report bore sufficient indicia of reliability, it had to consider analysis whether the reliable tip created a reasonable suspicion that the crime of operating a motor vehicle while under the influence of alcohol had been or was being committed. While there was no specific information provided by the caller regarding alcohol consumption, the Court surmised that "swerving all over the road" is a significant indicator of drunk driving. Here, Trooper Dwyer could reasonably suspect that the behavior reported by the caller was consistent with driving under the influence of alcohol and, because he knew that Depiero was on probation for drunk driving. Trooper Dwyer's knowledge coupled with the caller's reliability created reasonable suspicion to make an investigatory stop, even though Trooper Dwyer had not personally observed any suspicious behavior. See ***Commonwealth v. Gomes,*** 453 Mass. 506, 511-512 (2009) (officer's knowledge that defendant has history of similar crimes contributed to reasonable suspicion that defendant had, was in the process of, or was about to engage in that criminal behavior). In sum, given the reliable report of a significant danger coupled with the knowledge of the defendant's criminal history, "the police would have been remiss had they not conducted an investigatory stop of this vehicle." ***Commonwealth v. Anderson***, 461 Mass. at 625.

Massachusetts Courts are stricter than the Supreme Court when examining cases involving anonymous tips.

Massachusetts Cases Regarding Anonymous Tips

Commonwealth v. Lubiejewski, 49 Mass. App. Ct. 212 (2000): An unidentified motorist reported via 911 call that a pickup truck with Massachusetts license plate number D34–314 was traveling on the wrong side of Route 195 in the vicinity of Route 140 in New Bedford. The motorist called again and relayed that truck was driving on the correct side of the highway. A state trooper ran a check of the vehicle and found that it was registered to the defendant. The state trooper drove to the address and stopped a vehicle matching the motorist's first description. The trooper did not make any observations concerning the operation of the vehicle. The trooper arrested the defendant for concluded operating his vehicle while under the influence of alcohol, and arrested him. The defendant was convicted and filed an appeal. The Appeals Court vacated the conviction and concluded that the troopers' observations of defendant's vehicle were insufficient to corroborate report received from anonymous informant. Additionally, the Court found that the stop of the defendant's vehicle was not justified under **emergency doctrine** or under **community caretaking doctrine**.

Commonwealth v. Lyons, **409 Mass. 16 (1990):** The Court found that an anonymous tip along with lack of police corroboration failed to establish reasonable suspicion to stop defendants. The tipster provided no information regarding the basis of the informant's knowledge or reliability, and the quantity and quality of the details the police corroborated were insufficient to establish any degree of suspicion that could be deemed reasonable. If the

anonymous tip provided some "specificity of non-obvious facts, which indicated that the tipster had some familiarity with the suspect, or specific facts, which predicted behavior," the Court may have found that reasonable suspicion existed.

Commonwealth v. Hurd, 29 Mass. App. Ct. 929, 930, 557 (1990): The Court found that the information the police received from an anonymous caller that a man who appeared to be drunk was getting into a blue automobile with New Hampshire license plates in front of a package store with three small children in the vehicle. The police responded to the call and when they arrived at the location, they saw stopped the vehicle as they saw it approaching the entrance to Route 128, a high speed highway. The Court found the stop was reasonable based on the facts.

Commonwealth v. Famania, 79 Mass. App. Ct 365, (2011): An anonymous call regarding a person getting off a bus with a handgun in his backpack led Court to conclude that there was reasonable suspicion to do a pat-frisk.

Commonwealth v. Love, 56 Mass. App. Ct. 229 (2002): The source of the tip or information reported to the police was based on the "witness' personal observations and the reliability (veracity) prong will be satisfied when the source of the tip or information is identifiable if not identified." In ***Love***, a passenger in a vehicle stopped at a police barracks to report that there were two vehicles racing. Even though the trooper did not obtain the individual's name the Court held that the individual was identifiable by the license plate that the desk officer had recorded.

Commonwealth v. Carey, 407 Mass. 528 (1990): The Court in ***Carey*** that "if the citizen or victim informant is an eyewitness, this will be enough to support probable cause even without specific corroboration of reliability." In Carey, student reported to a teacher that he observed the defendant in possession of a gun in school. While the student's identity was not disclosed, police treated the report reliable based on the student's eyewitness account and the teacher's knowledge of the student's identity.

Commonwealth v. Lauture, 84 Mass. App. Ct., 1115 (2013): The police received a 911 report from an unidentified caller that a man with black 'long dreads' was carrying a gun and was about to shoot someone at specific location. The police acted upon the call since dispatch provided police with a specific location, name, gender and distinctive hairstyle. Based on all this information, it was 'reasonable for the police' to suspect that the defendant was the individual who prompted the 911 call given that at least one police officer, who arrived on the scene within seconds of the call, testified that the defendant was the only person whom he observed in a crowd of fifty to seventy people who matched the caller's description. The police arrived and removed the defendant from this car and frisked him. The defendant appealed arguing that an unidentified caller contained sufficient evidence of reliability and a basis of knowledge to justify the officers' actions.

Conclusion: The Appeals Court concluded that the facts presented in this case satisfied the reliability and knowledge prong that provided police with reasonable suspicion to pat-frisk the defendant. The Court found that the caller was observing the suspect as he made the call and had **knowledge** through first hand observations. The caller gave panicked observations that

the suspect was about to shoot someone and he pleaded for police to respond immediately because the suspect was "standing right there."

The second issue was whether the detail the caller provided was sufficient to establish the **reliability** of the call. The caller provided the location of both the suspect and the caller, the suspect's first name, the type of handgun, and the location of both caller and suspect. In addition to the information that the caller supplied, the police officers were able to corroborate the information through their own observations. When the police arrived, they saw a person whose appearance was consistent with the 911 call description of a male with long dreadlocks and who 'retreated' as they approached. The police's suspicions were further raised when they commanded the defendant to exit the vehicle and he "glanced in the direction of the approaching officer and made a quick and suspicious movement to the area of the middle console, as if reaching for or placing something." These suspicious movements, in conjunction with the defendant being the only person at the location matching the caller's description, justified the exit order to the defendant. The Court concluded that all these factors gave the police reasonable suspicion to pat frisk the defendant for their safety and the safety of others.

Supreme Court Case on Anonymous Tips

Navarette v. California, 134 S.Ct. 1683 (2014)**:** The Supreme Court concluded that an anonymous call can provide police with reasonable suspicion to stop the vehicle. The caller's eyewitness account of the truck's reckless driving coupled with the fact that the police corroborated the truck's description, location and direction established that the tip was reliable to justify the stop. The specific details about the vehicle including the color, style and type of vehicle along with the license plate which would suggest the caller possessed eyewitness knowledge of the alleged driver. Additionally, the police were able to corroborate specific details that were provided to them by the call. Typically, reports that are "contemporaneous with the event are perceived as more trustworthy because there is less likelihood of deliberate or conscious misrepresentation." Lastly, the Supreme Court found the 911 caller reliable because she called the emergency system where calls are recorded and can lead to the identification of the caller.

- ***TRAINING TIP: Navarette*** does not establish that every anonymous report of reckless driving gives police reasonable suspicion to stop a vehicle. If the prosecutor had introduced the 911 tape or dispatcher information during the suppression hearing, the case may never have reached the Supreme Court.

United States v. Cortez, 449 U.S. 411 (1981): The Supreme Court has concluded that police are permitted to conduct brief investigative traffic stops under the 4th Amendment if the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." The "reasonable suspicion" necessary to justify such a *stop "is dependent upon both the content of information possessed by police and its degree of reliability," which is particularly relevant when analyzing anonymous tips.*

Adams v. White, 407 U.S. 143 (1972): "An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous

tipster's veracity is "'by hypothesis largely unknown, and unknowable." However an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."

III. Searching Cell Phones in the Digital Age

New Update on Cell Phone Searches

Police need a warrant to search cell phones!

The United States Supreme Court consolidated two *cases* ***Riley v. California*** and ***U.S. v. Wurie*** because they both questioned whether police could search cell phones without a warrant even if the search was conducted incident to arrest.

Riley v. California**,** 134 S. Ct. 2473 (2014) and ***U.S. v. Wurie*****,** 134 S. Ct. 999 (2014): *The Supreme Court concluded that police* ***need to get a warrant*** *to search a person's cell phone even if the phone is searched incident to arrest*. Because "modern cell phones are not just another technological convenience," and "the fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." The Supreme Court held that its response to "the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant." *The two traditional grounds for allowing a search incident to arrest – harm to the officer and destruction of evidence – also would not apply since digital data poses no harm to police and the destruction of evidence stored within the phone can be preserved.* Although "this decision will have some impact on the ability of law enforcement to combat crime, the Supreme Court clarified that "information on a cell phone **will generally require a warrant before a search but is not immune from search**." Today, "cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's persons because cell phones have immense storage capacity." Since people store volumes of personal information within phones, an individual's privacy concerns outweigh any government interest. While police can certainly examine the physical aspects of a phone to insure there is no razor blade hidden between the phone and the case, the Supreme Court did not agree that cell phones are harmful to police. The Supreme Court concluded that getting a warrant would not apply if there were exigent circumstances.

- **TRAINING TIP:** In light of this ruling, the limited warrantless search of call history logs that were upheld in ***Phifer*** and ***Berry*** would now not be lawful without a warrant now. *The Supreme Court specifically stated that searching call phone logs would be prohibited even if police suspect they may find evidence affiliated with the crime the person is arrested for and even if searched after an arrest.*

Warrantless search of a firearm is tossed when police search a cell phone because there were no exigent circumstances.

Commonwealth v. Dyette, 87 Mass. App. Ct., 548 (2015): Police were on patrol in Roxbury and as circled back to a park where a group was drinking and shooting off fireworks. This particular area is known for a lot of firearm activity including homicides and shootings. There were no lights on inside the park which would suggest that the park was closed. The police noticed two men, one wearing a white t-shirt and hat and the other a blue t-shirt. The men appeared "overly concerned" by the officer's presence and began to leave the park at a normal pace. As the men exited the park, they started running, almost colliding into each other. A foot chase ensued and the two men split up. Officer Christopher Steele (hereinafter referred to as "Officer Steele") was in a marked cruiser drove to a spot where someone likely on foot would exit the park. Officer Steele observed a man wearing a black t-shirt running with a flip phone near his head out of the park. The officer recognized this man "from numerous encounters including a firearm arrest." Officer Steele drew his gun and ordered the man on the ground. The man was pat-frisked and handcuffed. He told Officer Steele that he was walking on the sidewalk even though he was breathing heavily. The man stated that he had just being talking with his girlfriend. Officer Steele grabbed the man's phone and looked through the call history log finding an array of numbers and symbols. Police canvassed the area and recovered a white t-shirt and hat in a nearby garbage can by the park entrance. "Two (2) loaded firearms were located near a rock formation where the chase began, one to the left and one located further to the right along the defendant's flight path. The defendant, Darren Dyette was charged with possession of a firearm and carrying a loaded firearm.

The defendant argues that the police lacked reasonable suspicion to conduct an investigatory stop, the stop escalate to an arrest lacking probable cause when the defendant was ordered to the ground at gun point and the police lacked a basis under exigent circumstances or search incident to arrest to search his cell phone without a warrant. The motion judge denied the motion and found the police had reasonable suspicion to believe Dyette was trespassing. Officer' Steele's prior knowledge that Dyette had a firearms conviction justified further detention and restraint of Dyette. The judge also concluded that when the firearms were recovered the police had probable cause to arrest and it also created an exigency allowing police to search the cell phone without a warrant. The case was appealed.

Conclusion: The Court reversed the convictions and concluded that the Commonwealth failed to prove Dyette possessed the firearm and second that the warrantless search of Dyette's phone was improper. The Court first considered whether the police had reasonable suspicion to stop and arrest Dyette. Additionally, the Court determined that the police should have gotten a warrant before searching Dyette's phone.

1st issue: Did police have probable cause to arrest Dyette?

The testimony of the three information supported that they had reasonable suspicion that Dyette was trespassing. There was testimony from one of the officers who knew that the park was closed to visitors because the lights were off. Even though there were no signs posted about trespassing, there was sufficient basis to determine the park was closed because the lights were off and due to the late hour. Although Dyette argued on appeal that he was passing through the park which is permissible under a city ordinance, the judge did not agree

because of the officers testified that Dyette was standing inside the basketball courts of the park.

The Court also held that Officer Steele was "entitled to take reasonable steps to ensure his safety" while detaining Dyette. ***Commonwealth v. Williams***, 422 Mass. 117 (1996). Even though Dyette was handcuffed, it does not automatically turn a stop into an arrest. ***Id*** at 118. Here Officer Steele knew Dyette had previously been convicted of a firearm offense, Dyette had fled the park and it is certainly reasonable that Officer Steele handcuffed him for safety concerns.

The Court determined there was insufficient evidence to prove that the firearm belonged to Dyette. While the firearm was recovered near Dyette's flight path from the park, no fingerprints or DNA were found on the firearm. Also, Dyette's false statement that he was talking to his girlfriend when the police stopped him, was insufficient to connect him to the firearm.

2nd Issue: Were police permitted to search the cell phone without a warrant?

The Commonwealth argued that the search of the cell phone was justified under the search incident to arrest or by exigent circumstances. According to the Commonwealth, the police were concerned that "the record of calls would be pushed out of the call history log due to the quantity of incoming calls." The Court did not agree and found that the phone was recovered in an unlocked state. There was no concern that the phone could be remotely wiped or that it was password protected. Additionally, the police could have resolved the issue of the incoming calls by turning of the cell phone, placing it in a Faraday bag or seeking a warrant. Since none of those steps were taken in this case the warrantless search of the cell phone was not justified.

With regard to whether exigent circumstances existed, the Court found that exigent circumstances exist when police need "prevent imminent destruction of evidence, pursue a fleeing suspect or assist persons who are seriously injured or in a grave danger." ***Riley*** at 2494. Under exigent circumstances, searching a phone without a warrant are justified but here the possible degradation of the call log does not rise to the level of an exigency and therefore police should have gotten the warrant.

Cell Site Location Information

Commonwealth v. Augustine, 467 Mass 230, (2014): The SJC **established a new rule of law** for the Commonwealth that law enforcement must obtain a warrant before acquiring cell site location information (hereinafter referred to as "CSLI") records because it qualifies as a search. The law became effectively immediately and applies to cases where a case is still pending or a conviction is not final. See ***Commonwealth v. Figueroa,*** 413 Mass. 193, 202-203 (1992).

Text Messages Can Qualify as Excited Utterances

Commonwealth v. Mulgrave, 472 Mass. 170 (2015): The SJC held that text messages can qualify as written communication and be admitted as a spontaneous utterance exception to the

hearsay rule, Mass. G. Evid. §803(2), in certain circumstances. The victim in this case texted her son minutes after the defendant had stabbed her six (6) times and was threatening to kill her. Similar to ***Commonwealth v DiMonte***, 427 Mass. at 239, where the victim's written communication qualified as an excited utterance even though she sent the communication as a text message. In ***DiMonte***, "where a victim is held hostage and is unable to communicate in any way other than writing or when a person's vocalization is impaired, "the Court found that a writing was admissible as a spontaneous utterance. Here, the SJC determined that the victim's 911 telephone call and the text message, "he is threatening to kill me," qualified as a spontaneous utterance. See ***Commonwealth v. Whelton***, 428 Mass. 24, 27 (1998)

The second element the SJC considered was whether a text message would qualify as an acceptable form of written communication under the spontaneous utterance exception. "Cellular telephone text messages are a unique form of written communications in that they allow for instant communication in much the same way as oral communications. Cellular technology allows for the instant sending and receiving of a text message, can qualify as a substitute for oral expression, and it diminishes the concern about spontaneity that might arise with other more deliberative modes of written communication. The growth of cellular telephones has made text messaging and other types of written electronic statements ubiquitous forms of rapid communication. For a person proficient in the use of the cellular telephone technology, sending a text message may involve no more effort than verbalizing a thought, feeling, or emotion in response to an event. A cellular telephone user may choose between verbal and written communication without sacrificing immediacy in the communication of the message. This opportunity for instant communication by way of cellular telephone technology elevates text messages, at least on the spontaneity scale, beyond the level of an ordinary writing." See ***DiMonte,*** 427 Mass. at 239. The SJC concluded that the spontaneity requirement is not undermined in this case by the fact that the statement is a writing in the form of a cellular telephone text message.

Revisiting Videotaping of Police

- **TRAINING TIP:** M.G.L. c. 272, § 99 only prohibits the secret recording of oral communications. Based on ***Glik v. Cuniffe***, police should assume they are being recorded all the time. In the event, you find that a person is secretly recording you, before you elect to charge under the wiretapping statute, consult with your chief, supervisor, legal advisor or District Attorney's Office.

Glik v. Cunniffe, 655 F. 3d 78 C.A.1 (2010)**:** The police were arresting a man in downtown crossing when the defendant, Simon Glik, started videotaping the police with his smart phone. The police arrested for Glik for violating the wiretapping statute, but did not charge him with obstructing justice. Glik challenged the matter and asserted that his first amendment rights were violated.

Conclusion: The case settled but *it was determined that as long as the police are aware they are being recorded,* it is not unlawful for a citizen to film law enforcement officers in the discharge of their duties in a public space. was a well-established liberty safeguarded by the First Amendment at time of citizen's arrest, and *therefore officers were not entitled to qualified immunity from arrestee's § 1983 First Amendment claim.*

Videotaping during a traffic stop

Gericke v. Begin, 753 F.3rd 1 (2014): The First Circuit Court holds that a citizen has a First Amendment right to videotape police during a traffic stop unless the police can reasonably conclude that the filming or the actions of the citizen are interfering with police duties. The issue before the Court was whether the officers were entitled to qualified immunity in response to Gericke's claim. The Court held that the police officers were not entitled to qualified immunity because Gericke's rights were **clearly established** at the time of incident and were violated when the police officers charged her with illegal wiretapping. Qualified immunity shields police officers from civil liability.

- **TRAINING TIP: *Gericke*** is an important case because it suggests that police can restrict individuals filming law enforcement while performing law enforcement duties if a reasonable officer would believe safety is at risk. When the Court issued its ruling in ***Glik***, most citizens assumed that they could film police performing public duties without any limitations. ***Gericke*** highlights that citizens can film police officers carrying out their duties even during a traffic stop unless a police officer can reasonably conclude that the filming is interfering with police duties. **With the increased use of cell phones and other digital devices, law enforcement should assume that they are always being recorded. Gericke did not distinguish between audio or video recording.**

VI. Eye Witness Identification

NOTE: There will be a more in depth block of training for eyewitness identification in this year's in-service! The material below highlights two recent cases.

This year's Eyewitness Identification Training Block provides background and protocols necessary to comply with present legal requirements and anticipate future developments in the law. The section below will only highlight some of the recent, legal developments that have occurred with Massachusetts case law.

Commonwealth v. Silva-Santiago 453 Mass. 782 (2009).Specified witness instructions are mandated for photo arrays or show-ups.

Comm. v. Brandon Watson 455 Mass.246 (2009) The SJC reiterates its expectation "that the identification protocols set forth in ***Commonwealth v. Silva-Santiago*** will be employed in the regular course of administering photographic arrays."

In July of 2013 the **SJC Study Group on Eyewitness Evidence** released its Report and Recommendations to the Justices. The Report contains recommended police protocols, many of which are currently required by case law and the rest likely to be incorporated in future SJC decisions. Chief William Brooks of Norwood PD was involved in the Study Group Committee and drafted the Protocols. Chief Brooks also created the MPTC Eyewitness

Identification Course, which is targeted to satisfy current legal requirements and likely future developments in the law.

Early in 2014, the SJC ruled that an eyewitness to a crime could not make an in-court identification unless the witness had previously participated in a proper out of court eyewitness procedure. ***Commonwealth v. Crayton*** 470 Mass.228 (2014). Following ***Crayton***, the SJC established jury instructions that contain provisional guidelines for the jurors to consider when hearing the case. ***Commonwealth v. Gomes*** 470 Mass. 352 (2015).

Changes with In-Court Identification

- **TRAINING TIP:** In ***Commonwealth v. Crayton***, the SJC announced a new rule restricting the ability of witnesses to make in-court identifications of the defendant where the witness has not made an earlier out-of-court identification. Specifically, the new rule states:

> **Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court show-up, and shall admit it in evidence only where there is "good reason" for its admission. The new rule we declare today shall apply prospectively to trials that commence after issuance of this opinion, and shall apply only to in-court identifications of the defendant by eyewitnesses who were present during the commission of the crime.**

Commonwealth v. Crayton, 470 Mass. 228, (2014): An eighth grade student, M.S., was doing homework at a computer in the basement technology center of the Central Square branch of the Cambridge Public Library when she saw a man sitting at an adjacent computer to the right of her. M.S. described the man as short, white, and bald, with a "little beard" and eyeglasses. M.S. looked at his computer screen and she saw an image of "a girl about ten years old, covering her chest." She could not tell whether the girl was wearing any clothes, because she saw only a "top view" and the man was "covering the computer screen" with the "umbrella-type" cover that was on it. M.S. waved" at her friend, R.M., a ninth grade student, who was also in the technology center of the library, and urged him to look at the man's computer. R.M. testified that he "just got a quick glimpse of the computer," and could only see "a small portion" of the screen, which displayed a young child wearing no clothes. He saw only the side of the man's face; he described the man as bald with a goatee. M.S. and R.M. walked over to a library employee who was working at the staff desk in the technology center that afternoon, and they told him that a person was looking at children wearing no clothes on the computer.

Police were contacted and the defendant was charged. Before trial, neither M.S. nor R.M. M.S. or R.M. participated in an identification procedure to determine whether they could identify the man they had seen at the computer two years earlier. They were never shown a photographic array or asked to view a lineup. The first time they were asked to identify the man was on the day of the trial and the only time they had seen him—when they were asked by the prosecutor on the witness stand at trial whether they saw the man in the court room,

and each identified the defendant. The defendant was convicted by a Superior Court jury on two indictments of possession of child pornography, in violation of G.L. c. 272, § 29C. The defendant appealed and the SJC granted direct appellate review.

The key issue was whether the in-court identification of the defendant by two eyewitnesses who had not previously participated in an out-of-court identification procedure was lawful.

Conclusion: The SJC established a new standard for the admission of in-court identifications where the eyewitness had not previously participated in an out-of-court identification procedure and conclude that the in-court identifications in this case would not have been admissible under that standard. The SJC further stated that this new rule does NOT apply to in-court identifications of the defendant by witnesses who were not present during the commission of the crime, but who may have observed the defendant before or after the commission of the crime. If an ADA wishes to have a witness make an in-court identification without having made a prior out-of-court ID, a motion in limine must be filed. The defendant then bears the burden to show that the in-court ID would be "unnecessarily suggestive" and that there is no "good reason" for the in-court ID. Some "good reasons" why an out of court ID would not be conducted prior to trial include the following:

- Concern for public safety;
- Victim was familiar with the defendant
- Arresting officer

After ***Crayton,*** police cannot leave identification to the DA, but need to perform an identification procedure in advance. Even if the identity of the defendant is established by other evidence, having the victim or witness point out the defendant has a powerful impact on the jury- it's worth the extra work. ***Crayton*** would still allow the arresting officer and persons who are familiar with the defendant to point him out in court without a prior identification procedure.

In ***Commonwealth v. Gomes*** 470 Mass. 352 (2015), the SJC developed a *provisional* set of jury instructions to be given in eyewitness identification cases based on the "generally accepted scientific principles" identified in the SJC Study Group Report. The SJC has invited public comment before it establishes a permanent Model Jury Instruction on eyewitness identification.

Officers who have completed the Eyewitness Identification Course will recognize these principals. The protocols taught in the Course are intended to satisfy, as much as possible, the concerns reflected in the provisional jury instructions.

The SJC has determined that it would be appropriate for judges to instruct juries regarding scientific principles regarding eyewitness identification that are "so generally accepted" identification evidence for future cases.

The **five generally accepted principles** are listed below:

1. Human memory does not function like a video recording but is a complex process that consists of three stages: acquisition, retention and retrieval.

2. An eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification.

3. High levels of stress can reduce an eyewitness's ability to make an accurate identification.

4. Information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making identification, can influence the witness's later recollection of the memory or of the identification

5. A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown. A prior viewing of a suspect in an identification procedure raises doubts about the reliability of a subsequent identification procedure involving the same suspect.

IV. Interview, Interrogation and Miranda

MIRANDA REQUIRED = (a) Suspect in custody, and

(b) Interrogation

- **TRAINING TIP:** The SJC in Massachusetts has held that the voluntariness of a suspect's statements can be impacted when police tactics "used in combination, or use repeatedly throughout an interrogation or used together with implied promises of leniency or minimization of the consequences the suspect is facing." If police use a combination of tactics than it is more likely that the statements will be suppressed. The SJC has not established a bright line rule that can be applied to all circumstances but rather has to examine the "totality of the circumstances" as to whether the suspect's statements were involuntary because of police coercion. ***Mincey v. Arizona***, 437 U.S. 385, 398-401 (1978); ***Commonwealth v. Selby***, 420 Mass. 656, 663 (1995).

Review of Miranda

Commonwealth v. Thomas, 469 Mass 531 (2014): In the early morning of July 6, 2006, the defendant, Chiteara M. Thomas, used a cigarette lighter to set fire to a curtain in the first-floor apartment of a three-story house in Brockton. The fire quickly spread from the first floor to the upstairs apartments. One of the residents in the third-floor apartment died in the fire, and several residents and guests in the second- and third-floor apartments were injured.

The police questioned Thomas on July 6, and 7, 2006, and arrested her during the interrogation on July 7, 2006. The video recordings of these interviews were admitted into evidence and played in their entirety at trial. Thomas filed a motion to suppress the statements she made during the July 6th and July 7th interview. The descriptions of what happened during each interview are recounted.

July 6th interview:

Brockton Police requested that Thomas go to the police station to discuss the fire while she was attempting to clear up her warrant in court. Thomas voluntarily went with Brockton police. Thomas was not handcuffed, frisked or arrested. State Trooper John Sylva (hereinafter referred to as "Trooper Sylva") and Brockton police Detective Dominic Persampieri (hereinafter referred to as "Detective Persampieri") met Thomas in an interview room at the police station around 1:53 P.M. Thomas agreed to have her interview recorded and she was read her Miranda warnings. Thomas indicated that she understood her rights, but asked what would have happened if she did not want to talk the police. The police informed her she could leave and the following conversation ensued.

> **TROOPER SYLVA:** "Before we proceed any further, I just want you to decide whether you want to speak with us regarding an incident."
>
> **THOMAS**: "I'd rather have a lawyer, because ... I'm accused of starting a fire… major fire."
>
> **TROOPER SYLVA**: "We didn't bring anything up to you."
>
> **THOMAS:** "No, I'm bringing it up, 'cause I know what I'm here for.... And I know what I done, but ... I'm not a fire-starter. I did not do that, man."
>
> **TROOPER SYLVA**: "So what you're saying to me is that you do not want to ... talk to us, is that correct?"
>
> **THOMAS:** "I want to talk, but I don't wanna talk unless I got somebody present who...."
>
> **DETECTIVE PERSAMPIERI:** "Do you want an attorney? Yes or no?"
>
> **THOMAS:** "Yes."
>
> **DETECTIVE PERSAMPIERI**: "Okay. End ... of conversation."

Detective Persampieri left the room and then reentered. Looking at the camera, Detective Persampieri asked, "Is that off?" Detective Persampieri looked down at Thomas and told her, "Understand one thing. Once you leave here, we're gonna do our investigation, and it's gonna get a lot hotter.... What we're trying to tell you, we're gonna give you the opportunity to tell us your side of the story. Okay?" The defendant said, "[T]hat's why I wanted to stay here," but, before leaving the room again, the detective interrupted her and said, "Sorry. You already lawyered up."

Trooper Sylva read Thomas her Miranda rights for a second time after she agreed to talk to police. Thomas signed the waiver form and she denied setting the fire, but made many incriminating admissions regarding her whereabouts in the hours before and immediately after the fire, the details of her feud with Johnson (including her admission that she smashed the windows of the house), the intensity of her animosity toward Johnson, her tumultuous romantic relationship with Brown and her jealousy regarding his purported sexual infidelity, and her disappointment that he had not sided with her in the feud with Johnson. The interview continued until 4:40 P.M. When the interview ended, Trooper Sylva stated, "We gotta put you through the system. Thomas was held in custody at the police station overnight on the default warrant for the July 3rd trespass charge, but was released the next morning.

July 7th interview:

Around 3 P.M., police told Thomas they wanted to speak with her again at the station. Thomas was "a little upset" and "annoyed" about returning to the station, but she was "compliant." Thomas waited nearly three hours at the station with officers by her side before she was interviewed again by Trooper Sylva and Detective Persampieri at approximately 6 P.M. There, Thomas was again given the Miranda warnings and again waived her rights. Booking began at 6:27 P.M. and another trooper was involved in the booking procedure. Thomas told him she wanted to speak with Trooper Sylva and Detective Persampieri again. During this second interview, Thomas admitted that she set the fire at the house and that she had no "intentions of it getting that big," and that she never meant to hurt anybody.

Conclusion: The SJC examined each interview separately and determined the following:

1. **July 6th** interview statements = should be suppressed because Thomas's invocation of the right to counsel was not honored and the interview should have ended.

2. **July 7th** pre-booking statements = should be suppressed because of a violation of the ***Edwards rule***

3. **July 7th** post booking statements = lawful

1st Issue: July 6th Interview:

The SJC compared this to ***Commonwealth v. Novo***, 442 Mass. 262, 267, 812 N.E.2d 1169 (2004), where an interrogation technique in which the police told the defendant that this would be his "only opportunity" to offer an explanation as to why he hit the victim. In ***Novo***, the police persisted in "this now-or-never theme," and went on to tell the defendant that, if he did not give them a reason for his conduct, "a jury were never going to hear a reason." ***Id.*** at 267-268. Although the detective did not expressly tell Thomas that, by having "lawyered up," she was losing her chance to tell her story to the jury, he communicated that she was losing her chance to tell her story to law enforcement officers which was unfair and misleading. "The SJC declared where a suspect has invoked her right to counsel and statements made afterwards are improper. There is nothing that would bar a suspect, after consulting with counsel, from deciding to speak with the police, and there is no sound reason why the police would refuse such a request."

2nd Issue: July 7th Pre-booking statements:

The SJC held that the July 7th pre-booking interview must be suppressed because it was conducted in violation of the ***Edwards*** rule. If it is determined that there was an ***Edwards*** violation at some point, police can still initiate another interview without taint. See ***Maryland v. Shatzer,*** 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010). In ***Shatzer,*** the defendant, who was in prison on an unrelated conviction, was questioned by police regarding a sexual abuse allegation. The defendant invoked his right to counsel, which ended the interview. Two and half years later, the police again interviewed the defendant in prison regarding these same allegations; this time, the defendant waived his Miranda rights and spoke with police without counsel being present. ***Id.*** at 101, 130 S.Ct. 1213. The Supreme Court established in ***Maryland v. Shatzer,*** a **bright-line rule that, that when there is a custodial invocation of the right to counsel followed by a break in custody, the *Edwards* rule applies for a period of fourteen days from the break in custody**. ***Id.*** at 110, 130 S.Ct. 1213. The Supreme Court determined that a fourteen-day period would provide "plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." ***Id.***

In the present case, the police initiated the pre-booking interview on July 7th, only one day after Thomas had invoked her right to counsel and on the afternoon of her release from custody that morning. Clearly, not enough time had passed and therefore the follow up interview violated the ***Edwards*** rule that was established in ***Shatzer***.

3rd Issue: July 7th Post-booking statements:

The SJC concluded that the post-booking confession does not need to be suppressed because the defendant initiated the interview on her own volition. The defendant was free from any taint arising from either the July 6th or the July 7th ***Edwards*** violations. The SJC examined what the Supreme Court considered in ***Oregon v. Bradshaw***, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), where a defendant who had invoked his right to counsel initiated communication with the police when he asked a police officer what was going to happen to him. The majority of justices concluded that the defendant's question opened up the communication with the police through his question. The majority and dissenting justices agree that the initiation question is only "the first step of a two-step analysis," and that, if the defendant is found to have initiated the post-invocation conversation, the police may re-interrogate only if the defendant also knowingly, intelligently, and voluntarily waives the right to counsel after receiving the Miranda warnings. Id. at 1044–1045, 1054 n. 2, 103 S.Ct. 2830. See ***Edwards***, *supra* at 486 n. 9, 101 S.Ct. 1880.

The SJC stated that Massachusetts considers a violation of the ***Edwards rule*** a violation of Miranda and the only way to overcome that taint is two-fold.

1. There needs to be a break in the events from the first taint

2. There needs to be some analysis under the "cat-out-of-the-bag.

The SJC found that the defendant's initiation of communication during her booking on July 7th was spontaneous and that she voluntarily told the booking officer she wanted to talk with the detectives again. Thomas' statements suggest that this was not part of a continued interrogation. Thomas' statements made during booking were made in a separate area from where the interrogation took place. Additionally, Detective Persampieri's statement to the defendant about "lawyering up" after she invoked her right to counsel qualified as coercive. The detective's statements suggest an intentional violation of the ***Edwards*** rule during the July 6th interview. Moments before Detective Persampieri restarted the interrogation, Thomas had invoked her right to counsel. Contrary to what happened on July 6th, the July 7th interview was not an intentional violation of the ***Edwards*** violation, but arose from the retroactive application of the ***Shatzer*** decision. The SJC concluded that Thomas' post-booking Miranda waiver was not the product of coercion or otherwise tainted by the earlier violations of *Miranda* and ***Edwards***. The statements made by Thomas during the pre-booking interview of July 7th should have been suppressed, but that the statements she made during the post-booking interview were admissible.

Pre-Arrest Statements

Commonwealth v. Libby, 472 Mass 37 (2015): The SJC held that pre-arrest statements the defendant made to police regarding the allegations that he sexually abused a six year old girl who lived in the same home as him, should not be suppressed. The SJC found that the defendant was not in custody at time he made the pre-arrest statements. The defendant voluntarily went to the police station to discuss the allegations against him. During the interview the police advised the defendant numerous times that he was not in custody and he was given two bathroom breaks and the police spoke in a conversational tone. When the interview concluded, the defendant left the station. Since the defendant was not in custody, Miranda did not apply. Although the defendant asked about an attorney while he was interviewed, his inquiry did not trigger Miranda nor did "he effectively invoke a right to counsel." The SJC concluded that "the defendant's musings about perhaps needing a lawyer, and his inquiry about how to get the court to appoint him a lawyer if he could not afford one, did not require the officer to cease all questioning, and did not render his pre-arrest statements inadmissible under *Miranda*."

Valid Waiver of Miranda

The *Commonwealth* bears the burden of proof, beyond a reasonable doubt, that the suspect made a *knowing, intelligent and voluntary* waiver of Miranda, based on the *totality of the circumstances*.

Commonwealth v. Delacruz**,** 463 Mass. 504, 515 (2012): The factors the court considers in assessing whether the defendant made a *knowing, intelligent, and voluntary* confession are: *promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency, and the details of the interrogation, including the recitation of Miranda warnings.*

***Commonwealth v. DiGiambattista*,** 442 Mass. 423 (2004): The court found that the *combination of trickery and implied promises*, a combination that it had *recognized as potentially coercive to the point of making innocent people confess to crimes*, was such that the Commonwealth could not meet its burden of proof on the issue of voluntariness.

The Supreme Judicial Court *noted that ongoing research has identified the use of false statements as a significant factor that pressures suspects into waiving their rights and making a confession*. This is particularly true where the false statement suggests a form of incriminating evidence that would be viewed as incontrovertible. If a suspect is told that he appears on a surveillance tape, or that his fingerprints or DNA have been found, even an innocent person would perceive that he or she is in grave danger of wrongful prosecution and erroneous conviction. *Id*. at 434-435.

False statements concerning ostensibly irrefutable evidence against a suspect are particularly troublesome when combined with suggestions of leniency in exchange for a confession. *A false statement concerning the strength of the Commonwealth's case, coupled with an implied promise that the defendant will benefit if he makes a confession, may undermine the defendant's ability to make a free choice.* The specter of coercion arises in these circumstances from the possibility that an innocent defendant, confronted with apparently irrefutable (but false) evidence of his guilt, might rationally conclude that he was about to be convicted wrongfully and give a false confession in an effort to salvage the situation. ***Id****. at 435.*

***Commonwealth v. Baye*,** 462 Mass. 246 (2012): The Supreme Judicial Court found that the investigators' minimization of defendant's crimes, *implied assurances of leniency*, and suggestion that such leniency was a "now or never" proposition reinforced their insistence that, in admitting to involvement in the fires, the defendant would not necessarily be admitting to having committed any serious felonies. These misrepresentations, *in combination with the investigator's attempts to persuade the defendant not to obtain the advice of counsel on whether to exercise his right to remain silent*, constituted an *affirmative interference* with defendant's understanding of his fundamental constitutional rights. Also, the Commonwealth failed to show beyond a reasonable doubt that defendant's statements were nevertheless freely and voluntarily made.

- ***TRAINING TIP:*** As a friendly reminder, when police make a warrantless arrest and the defendant is unable to make bail, police must contact the clerk magistrate within twenty-four (24) hours of the arrest and the clerk will determine if there was probable cause for the arrest. If the 24–hour time period is exceeded, police must bear burden of demonstrating that an extraordinary circumstance cause delay. See ***Commonwealth v. Jenkins***, 416 Mass. 221 (1993).

Revisiting Juvenile Miranda

An interested adult must be present before police can question a juvenile under the age of 14. Although a juvenile between the ages of 14-18 can waive the presence of an interested adult during questioning, it is high burden to satisfy.

Interested Adult Requirements

A. *Must be 18 years old*

A minor may not serve as the interested adult.

***Commonwealth v. Guyton,* 405 Mass. 497, 502 (1989):** The court ruled that the juvenile's seventeen-year-old sister, while an adult for purposes of the criminal law, was not an adult for purposes of the interested adult rule.[1]

B. *Cannot Be Incapacitated*

The interested adult cannot be under the influence of drugs and/or alcohol while advising the juvenile on whether or not to waive his/her *Miranda* Rights.

Best Practice: Electronically record the reading of *Miranda* while specifically inquiring on the condition of the Juvenile and Interested Adult. (Drugs, alcohol, prescription medications, etc.)

C. Act in the Best Interest of the Juvenile

The Interested Adult must be in a position to advocate for the juvenile and not be antagonistic. In deciding whether the adult is considered an interested adult, "the facts must be viewed from the perspective of the officials conducting the interview." ***Commonwealth v. Berry****,* 410 Mass. 31, 37 (1991). Under the objective standard the court determines whether it should have been *reasonably apparent* to the officials questioning a juvenile that the adult who was present on his or her behalf *lacked capacity* to appreciate the juvenile's situation and to give advice, or *was actually antagonistic* toward the juvenile, a finding would be warranted that the juvenile has not been assisted by an interested adult and did not have the opportunity for consultation contemplated by the rule. *Id.* at 36-37.

D. Special Relationship

The relationship between the Interested Adult and juvenile must be considered a "special relationship" acting in "loco parentis." The adult must be someone who "is sufficiently interested in the juvenile's welfare to afford the juvenile appropriate protection." ***Commonwealth v. Alfonso A****.,* 438 Mass. 372, 383-384 (2003).

E. Presence of Interested Adult

Under Age 14: Actual presence of the juvenile's parent or interested adult is required in order to have a valid waiver of *Miranda* rights. ***Commonwealth v. MacNeil****,* 399 Mass. 71 (1987).

Ages 14 through 17: Without the presence of a parent or interested adult, the *Commonwealth* must show that the juvenile has "unusual sophistication or knowledge" regarding his/her *Miranda* rights. ***Commonwealth v. Alfonso A****.,* 53 Mass. App. Ct. 279 (2001*).*

F. Consult with Interested Adult

***Under 14 Years of Age*:** The Commonwealth must prove that the juvenile and parent (interested adult) were given the actual opportunity for consultation, before

[1] On September 18, 2013, House Bill 1432 expanded the age of a juvenile to age eighteen. Therefore age seventeen is no longer considered an adult for purposes of criminal law.

waiving Miranda. The Commonwealth is not required to prove actual consultation occurred. ***Commonwealth v. Philip S.,*** 414 Mass. 804, 811 (1993).

Over 14 Years of Age: The Commonwealth must prove that the juvenile was given a "genuine opportunity" to consult with an Interested Adult before waiving Miranda. The opportunity should be *immediately and evidently available* before the juvenile waives his or her Miranda rights. ***Commonwealth v. Alfonso A.,*** 438 Mass. 372, 376-386 (2003).

Interested Adult - Hindsight

Commonwealth v. Philip S., 414 Mass. 804, 810 (1993): The SJC stated that, "[w]e reject the notion that a parent who fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent. Our interested adult rule, which we conclude was satisfied in this case, *is not violated because a parent fails to provide what, in hindsight and from a legal perspective, might have been optimum advice."*

Interested Adult – Foster Parent

Commonwealth v. Escalera, 70 Mass. App. Ct. 729 (2007): A fifteen-year-old juvenile and two (2) others were charged with burning a mosque in Springfield. Officers read the defendant his Miranda rights in the presence of his foster mother. Both the defendant and his foster mother signed the Miranda waiver and were allowed to consult privately before any questioning. The defendant subsequently made incriminating statements and was later found delinquent. The defendant appealed claiming that his statement should have been suppressed because a foster parent cannot serve as an interested adult for the purposes of Miranda.

The Appeals Court held, "foster parents are neither agents of the police nor involved in the criminal process." Also, DSS (currently known as Department of Children and Families) "*helps to support parents in need of assistance or, as is the case here, provides an adequate parental substitute. This substitute role is not in conflict with the duty of an interested adult*." *Id*. at 732-733.

- **TRAINING TIP*:*** Compare a foster parent to an employee or agent of the Department of Youth Services ("DYS"). An employee of a private organization under contract with the DYS cannot serve as an interested adult because a DYS employee has "*a duty to report to the police if he learned a juvenile committed a crime.*" See ***Commonwealth v. A. Juvenile,*** 402 Mass. 275, 277-280 (1988).

Interested Adult – Must Understand Juvenile's Rights

Commonwealth v. Wade W., 81 Mass. App. Ct. 1131 (Unpublished) (2012): The Saugus police were investigating a bomb threat that had been written in the boys' bathroom at Saugus High School. Two officers spoke with the sixteen year old **juvenile**, in the presence of his **mother and stepfather**, at the Saugus police station. The interview was considered to be a "custodial interrogation." At the beginning of the interview, police read the juvenile his Miranda rights "*one after another fairly rapidly, and without stopping between them*." At the end, the juvenile was asked if he understood his rights, and then passed the form to the **juvenile's mother** and asked her to look at it. Police said more than once that both the **juvenile** and his **mother** could ask questions if they wished. The **juvenile's mother** looked briefly at the form and then handed it to her son, who signed it immediately without appearing to read it. Police

then directed the **juvenile** to a place on the form saying, "[T]his next line just is the waiver; keeping these rights in mind that you still want to talk to us." The **juvenile** began to write and the following exchange took place between the mother and police:

Mother: "So he's not waiving his rights?"

***Detective Forni*:** "I'm sorry?"

Mother: "Is that what he's doing? He's not waiving his rights?"

Detective Forni: "Well, no . . . ."

Detective Donovan: "He's just saying that he'll talk to us."

Detective Forni: "Yeah, that's what we say. If you would, just sign as a witness and then just put mother there."

The juvenile subsequently made various statements to police. The defendant filed a motion to suppress, which was denied and was later found delinquent for making the bomb threat and tagging.

On appeal, the Appeals Court held "[u]nder all of the circumstances here, we are persuaded that the Commonwealth *did not meet its burden* of proving beyond a reasonable doubt that the juvenile's waiver of his rights was knowing and intelligent, *because it is not clear that his mother, the interested adult, in fact understood those rights."*

A parent can still qualify as an interested adult even if they exhibit domineering conduct during an interview!

Commonwealth v. Quint, a juvenile*,** 84 Mass. App. Ct., 507 (2013): The Court held that the juvenile's mother qualified as an interested adult and the juvenile's statements were made voluntarily and should not have been suppressed. The mother's "domineering conduct" during the police interview did not render the juvenile's statements involuntary nor did his mother's actions qualify her as disinterested adult. Here the Court determined that the mother's conduct was not coercive and her involvement suggested she had a genuine interest in the juvenile's welfare. The mother was not argumentative with the juvenile and she focused on "the descriptions of and time of the alleged break-in, and descriptions of the juvenile's friends." During the interview, the mother even asked the police to clarify the concept of joint venture for the juvenile, which is a further indication that she qualified as an "interested adult." It was evident throughout the interrogation, that there was no objective manifestation of animosity between the mother and the juvenile. See ***Commonwealth v. McCra, 427 Mass. 569 (1998). Based on the mother's participation, the Court found the mother qualified as an "interested adult" and had sufficient mental capacity to advise the juvenile.

***Commonwealth v. Pacheco*,** 87 Mass. App. Ct. 286, (2015): Taunton Police executed a search warrant for a home where a juvenile resided with his guardian because they suspected he was involved in a shooting. The juvenile was arrested when police discovered a handgun and several glassine bags containing a substance that appeared to be heroin in the juvenile's bedroom.

The police advised the juvenile's guardian that she could accompany him to the police station to act as an interested adult. The juvenile was sixteen years, ten months old at the time. Around 11:06 P.M., Detective Lynne Pina and another officer questioned the juvenile in a small interview room at the station. Detective Pina gave the juvenile and his guardian a notification of rights form. Detective Pina read verbatim the Miranda rights from the form, and gave the juvenile and his guardian an opportunity to read the form as well. No one left the room including the police officers. Without requesting an opportunity to speak to each other in private, the juvenile and his guardian signed the rights form.

The interview began but was disrupted for a short period of time when the video recorded stopped working. After four minutes passed, Detective Pina told the juvenile, "We will pick up where we left off; you have been given rights and signed forms," and resumed the interrogation. The juvenile continued to deny his involvement in the shooting. The police told the juvenile they had evidence proving he possessed the gun even before the shooting took place, and that a dog had traced a scent from the railroad tracks where the shooting occurred to his back door. The police indicated that there were witnesses that could identify the juvenile and they urged the juvenile to tell them the truth. Detective Pina stated that if the juvenile cooperated, the district attorney may consider that favorably during the investigation.

The juvenile asked, "Can I have a few minutes first?" The police responded, "Sure, absolutely. Before the officers left the room, the guardian asked whether the video recorder would remain on and the police indicated that it would. Speaking in low tones, the juvenile and the guardian began to exchange the guardian's cellular telephone (phone). The juvenile first took the phone, entered some text, and showed it to her. She entered some text and returned the phone to him. After about thirty seconds, while the juvenile was entering text on the phone, Detective Pina returned to the interview room and told the juvenile to stop. He complied and returned the phone to the guardian. The juvenile and the guardian did not speak after the interruption. The police returned and resumed and the interview continued for another twenty minutes. The juvenile admitted that he shot the gun and throughout the remainder of the interview the guardian used her phone without any objection from the officers. The interrogation ended shortly after the juvenile's confession.

The juvenile was charged, and later indicted, as a youthful offender for armed assault with intent to murder, G.L. c. 269, § 18(b); assault and battery by means of a dangerous weapon, G.L. c. 265, § 15A(b); and unlawful carrying of a firearm, G.L. c. 265, § 10(*a*). After the motion judge decided the juvenile's motion to suppress statements, the Commonwealth appealed from the partial suppression order, the juvenile cross-appealed from the partial denial of his motion, and a single justice of the Supreme Judicial Court allowed the Commonwealth's application for interlocutory appellate review

Conclusion: The Court held that the juvenile Miranda waiver was valid at the beginning of the questioning, but that the police failed to honor his mid-interview request to a meaningful opportunity to consult with his guardian. The statements made during the first part of the interview were admissible but statements after the juvenile's opportunity to consult were suppressed.

1st Issue: Did juvenile have a meaningful opportunity to consult with interested adult? The Court determined that the juvenile had an opportunity to consult with his guardian and validly waived his rights before talking to Detective Pina. Detective Pina advised the juvenile of his Miranda rights in front of the juvenile and his guardian and both signed the waiver form. "Nothing more need be shown to demonstrate that the presence of [his guardian] gave the juvenile a realistic opportunity to get helpful advice if he needed it." ***Commonwealth v. MacNeill,*** 399 Mass. at 78, 502 N.E.2d 938. The presence of the juvenile and his guardian demonstrated that they understood what was transpiring. ***Commonwealth v. Guthrie G.,*** 66 Mass.App.Ct. at 430–431, 848 N.E.2d 787

2nd Issue: Mid-interrogation request to consult: The police tried to convince the juvenile to confess and when the police left the room, the juvenile and the guardian began to communicate. When the juvenile and his guardian attempted to communicate privately using the guardian's phone, Detective Pina quickly interrupted them and told the juvenile not to use the phone. The motion judge found that the police's actions interfered with the juvenile's opportunity to consult with an interested adult and suppressed any statements following this interference. The Court pointed out that the police did not object to Ms. Courtney's using her phone once the juvenile started to confess. Upon review of the videotape, it was clearly the juvenile's use of the phone that prompted the interruption; the police never placed any limitations on Ms. Courtney's use of the phone. Nonetheless, the police-imposed prohibition on the juvenile's use of the guardian's phone effectively ended any consultation between them.

Here, the juvenile unambiguously requested to speak with his guardian to "make sure" whether he should "help" himself and "start cooperating with the case and the investigation," as the officers were urging him or, instead, to end the interview. Once the juvenile made a request to consult with his guardian about the exercise of his Miranda rights, the police were obligated to allow the juvenile to confer in private with his guardian. See *Hall v. State,* 264 Ind. 448, 452, 346 N.E.2d 584 (1976). The police's actions "interrupted the communication between guardian and defendant." While the Commonwealth argues that the break in the interrogation alone was sufficient to "allow the juvenile and his guardian to consider whether to continue with the interview or end it, or to continue only with the assistance of an attorney," the Court found it significant. Based on these circumstances, the police deprived the juvenile of a "genuine opportunity" to confer with his guardian about the exercise of his Miranda rights and the statements should be suppressed.

Commonwealth v. Smith**,** 471 Mass. 161, (2015): The Court held that the definition of term "juvenile" includes 17-year-olds in various contexts including criminal record information, appointment of counselors to juvenile offenders, and imposition of criminal assessments, but does not apply to the defendant, who was 17 years and five months old at time of arrest on suspicion of murder.

The defendant was questioned about the murder at the Brockton police station. At the time, police booked the defendant and read him his Miranda rights. The police also provided the defendant with a Miranda waiver form and they asked him to read it out loud. A detective assisted the defendant and he would pause after each line and ask whether the defendant understood. The defendant initialed each of the rights on the form as well as the word "YES" at

the bottom of the form. He also agreed orally to waive his rights and to tell his side of the story.

The defendant was charged with murder. Before trial, he moved to suppress his statements to police. The defendant argued, among other things, that his Miranda waiver had not been valid because he did not have a meaningful opportunity to consult with an interested adult. The motion to suppress was denied and it was determined that the interested adult rule was not applicable because although, at seventeen years of age, the defendant was a "minor," he was not a "juvenile" subject to that rule. Based on the evidence presented, including a recording of the interviews with the defendant, the judge found that "the circumstances surrounding the defendant's waiver of rights show, beyond a reasonable doubt, that it was voluntarily and intelligently made."

Several years after the defendant was convicted, the Legislature enacted St. 2013, c. 84 (2013 act), which expanded juvenile jurisdiction to include seventeen year olds. The defendant appealed his conviction and argued that the new law should apply to him.

The defendant argued that the passage of the 2013 act entitles him to the protection of the interested adult rule. The Court held that the 2013 act, which became law on September 18, 2013, "shall take effect upon its passage." St. 2013, c. 84, § 34. In ***Watts v. Commonwealth***, 468 Mass. 49 (2014), the Court determined that the 2013 act applies prospectively only. Here the defendant was interviewed by police more than six years prior to the effective date of the 2013 act, and his motion to suppress was denied more than three years before that date. The propriety of the defendant's Miranda waiver and the admissibility of his statements are not affected by the passage of the 2013 act.

Commonwealth v. Chism, WL 924236 Mass Superior Court 2015: Philip Chism, a 14 year old student at Danvers High School, was reported missing by his mother in the early evening of October 22, 2013. At the same time, Colleen Ritzer, a teacher at Danvers High School, failed to return home after school. Shortly after midnight, Topsfield Police Officers discovered Chism walking along Route 1. After transporting Chism to the Topsfield police station, Topsfield police officers conducted a personal property inventory of Chism's belongings and discovered credit cards and a driver's license in the name of "Colleen Ritzer." At that time, the Topsfield police were not aware that Ms. Ritzer was also missing. Officers found a purse containing female underwear and a blood-stained box cutter. When asked "whose blood is this?", Chism replied "it's the girl's." Chism then made additional incriminating statements prior to being advised of his Miranda rights, which he waived.

Danvers police learned information linking Chism to the disappearance of Ms. Ritzer, which appeared to be caused by foul play. State police were dispatched to transport Chism to the Danvers police station from Topsfield. Chism's mother arrived at the Danvers station shortly after 1:30 a.m., prior to her son's arrival at the station, whereupon she was questioned by detectives who were focused upon locating the missing teacher. The motion judge found that the detectives advised Ms. Chism that she would be able to speak with her son, but they did not explicitly tell her that her role was to assist her son understand and decide whether to waive his Miranda rights.

Police initially questioned Chism with his mother present in the interrogation room. During the recitation of the Miranda rights, Ms. Chism inquired if she could get an attorney that night and she explained that she believed it was important to have an attorney. She also stated that her son was despondent and that she did not know what was happening. Ms. Chism told her son that it would be better for him if he spoke with the police, to which Chism replied "no." Chism then asked whether he had to talk to the police with his mother in the room. When the mother offered to leave, Chism emphatically urged her to go. The mother signed the Miranda waiver form and departed. Chism later said in the interview that he disliked his mother and anybody else. Chism made highly incriminating statements that led police to the location of Ms. Ritzer's dead body on the Danvers High School grounds.

The defendant contended that the statements he made at the Topsfield police station should be suppressed because they were made while he was in custodial interrogation, and had not properly waived his Miranda rights.

1st Issue: Was Chism in custody at the Topsfield Police Department?

There is no dispute that Chism was in protective custody at the Topsfield Police Department. However the court needed to determine whether the he was also in police custody, the court may consider "(1) the place of the interrogation; (2) whether the investigation has begun to focus on the suspect, including whether there is probable cause to arrest the suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the suspect; and (4) whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with the defendant's arrest." ***Commonwealth v. Bryant***, 390 Mass. 729, 737 (1984). See ***Commonwealth v. Carnes***, 457 Mass. 812, 818–819 (2010).

(1) **Place of the Interrogation**: The defendant's detainment at the Topsfield police station "does not, in itself" trigger custody. ***Commonwealth v. Almonte***, 444 Mass. 511, 518 (2005). See ***Commonwealth v. Lopes, 455 Mass. 147, 163 (2009)***. Although the defendant was in the Topsfield police station, he was not handcuffed and he was seated on a bench in front of the small, but open, booking area. The officers gave the defendant food and blankets. Another significant factor the court considered was that the defendant could not see jail cells from where he was seated.

(2) ***Focus of the Interrogation***: The Topsfield police brought the defendant to the station because they believe he was a missing juvenile, not because they suspected he was involved in his teacher's disappearance. The police never relayed to the defendant that he was a suspect in any crime is a factor suggesting that he was not in custody. ***Commonwealth v. Bly, 448 Mass. 473, 492 (2007)***.

(3) ***Nature of the Interrogation:*** The police questioned the defendant about the contents of his backpack in a calm and non-aggressive tone. Moreover, the defendant does not contend that the nature of the police officer's questioning was inappropriate or coercive.

(4) ***Defendant's Ability to Leave:*** The defendant's ability to leave the Topsfield police station or otherwise end questioning weighs in favor of custody. Although the defendant was not under arrest at the Topsfield police station, as a recently found missing juvenile, he was in protective custody and clearly not free to leave.

After weighing the factors, the court concludes that the defendant was not in custody for purposes of Miranda and therefore Miranda warnings were not required. See ***Bryant***, 390 Mass. at 737.

2nd Issue: Did Chism validly waive his Miranda rights when questioned at the Danvers police station?

The Court found that the defendant did not validly waive his Miranda rights based on his demeanor and behavior at the Danvers police station. At two separate points during the questioning at the police station, the defendant told Danvers police he did not want to talk them. Additionally, the defendant's mother requested an attorney on a number of occasions.

Another factor the court analyzed was the defendant's demeanor during the recitation of Miranda. The videotape shows that the defendant did not appear to be fully engaged as the officers explained his Miranda rights to him. It is clear that the defendant wanted to talk to the police without his mother present in the room and that he had no intention of talking while his mother was present in the room. The defendant was rude, dismissive and scornful of his mother and her desire to help him. At one point the defendant told his mother to leave. Because of the defendant's demeanor around his mother and the potential that he did not fully understand or appreciate the *Miranda* warnings, the Court was not convinced beyond a reasonable doubt that the defendant was paying attention to the *Miranda* warnings to the extent necessary to find that he understood and waived his *Miranda* rights beyond a reasonable doubt.

"Accordingly, the defendant's statements, while voluntarily made, must be suppressed because the court cannot find beyond a reasonable doubt that the defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. The defendant's statements at the Danvers police station will not be available to the Commonwealth as evidence during its case in chief. Since the court finds the statement was made voluntarily beyond a reasonable doubt, however, if the defendant testifies at trial, the statements will be available to the Commonwealth for impeachment purposes."

3rd Issue: Did the defendant's mother qualify as an interested adult?

The defendant's mother informed police that she was familiar with juveniles' rights from her prior employment with Child Protection Services. While the defendant's mother was at the Danvers police station, neither officer explicitly conveyed that her role was to consult with her son and assist him in understanding his Miranda rights. The defendant's mother wanted to assist her son and cooperate with police because she believed someone had been hurt. The videotape shows the defendant's mother was engaged and interested in her son's well-being especially when she asked to have an attorney present. The court found that the defendant's mother was an interested adult and was given a meaningful opportunity to consult with the

defendant. Although the best practice would be to advise a parent of his/her role as interested adult, the defendant's mother in this case, appeared to understand her role and her son's constitutional rights. Although the defendant's mother qualified as an interested adult, she could not waive her son's right to Miranda. The court emphasized that there is no Massachusetts case law that explicitly or implicitly permits a parent or interested adult to invoke a juvenile's right to counsel on their behalf.

- **TRAINING TIP:** The ***Chism*** motion also serves as a good review of the community caretaker exception involving juveniles and the inevitable discovery doctrine.

Chapter 3

CRIMINAL LAW DEVELOPMENTS

I. Review of Pivotal Marijuana Cases

Possessing Marijuana less than an ounce is not a criminal offense anymore. However distributing marijuana is still illegal.

- **TRAINING TIP:** On December 4, 2008, G.L. ch. 94C, §§ 32L decriminalized the possession of marijuana weighing less than one (1) ounce after a ballot initiative voted in favor of the change. The law did not repeal M.G.L. c. 94C, § 32C, which prohibits possession of marijuana with the intent to distribute even if the amount is less than one (1) ounce. *Because of these changes, the Courts have emphasized that the observations of police officers along with their training experience are critical when determining whether there is sufficient evidence to charge possession with intent to distribute.* Some factors that Courts examine are listed below:

  a. Prior record of drug offenses including distribution
  b. Weight of the drugs
  c. Street value of the drugs *(important to include a value estimation in report)
  d. Possession of large amount of cash
  e. Possession of "marked money"
  f. Packaging of the drugs similar to what is found on the street
  g. Lack of personal use of paraphernalia
  h. Possession of scales
  i. Possession of multiple cell phones
  j. Air fresheners
  k. Books, ledgers, notes, records indicating sales, customers, monies owed, etc.

Possession of Marijuana

Commonwealth v. Cruz, 459 Mass. at 472 (2012): The Court established that the possession of a small quantity of marijuana (one ounce or less), without any evidence of criminal activity fails to support the search of a person, a backpack, or a vehicle for an additional quantity of marijuana. Police observation of a person with marijuana cigarette does not create probable cause to believe person has possession of more than one ounce of marijuana. Additionally, the facts in ***Cruz*** did not give the police officer reasonable suspicion to believe the defendant was distributing marijuana, had possession with intent to distribute marijuana or was operating a motor vehicle while impaired. All of these criminal offenses were not impacted by the decriminalization of marijuana.

Commonwealth v. Daniel 464 Mass. 746 (2013): The police were not permitted to search a vehicle because operator produced two small bags of marijuana from her pocket.

Possession with Intent to Distribute & Distribution

The SJC concludes that there was no probable cause to charge distribution based on the lack of specificity in the police report.

Commonwealth v Ilya I, Juvenile, 470 Mass. 625 (2015): Members of the Youth Violence Strike Force, a unit within the Boston Police Department were conducting surveillance in section of Dorchester known for drug and gang activity.

The police observed a male and female approach four (4) black teenagers and engage in a "brief conversation." Two of the teenagers walked up the street with the couple for a short distance while the other two teenagers remained in the location where the first encounter had occurred. The two teenagers who stayed behind appeared to be looking up and down the street. When the couple and two teenagers reached a certain point, they had a "brief interaction." Based on their observations, the officers believed "a drug transaction may have occurred," although they did not see an exchange.

As the police approached, the group, the four teenagers walked away "in a hurried manner." The juvenile, Ilya I, (hereinafter referred to as "the juvenile") who was part of the group looked back at the police several times as he crossed the street. The juvenile and one of the teenagers got in the vehicle while the other two teenagers exited the vehicle again and walked up the street. The vehicle drove one block before the two teenagers returned to the vehicle. The police approached the vehicle and asked the passenger to roll down his window. The juvenile, who was the passenger, opened the door instead. The police smelled an odor of unburnt marijuana and asked the juvenile to exit the vehicle.

When the juvenile go out of the vehicle, he looked down twice at his groin area. The juvenile's behavior coupled with the smell of unburnt marijuana, prompted the police to conduct a pat-frisk. The police recovered thirteen individually wrapped bags of marijuana inside a larger, plastic bag from the juvenile.

The juvenile was arrested and charged with possession of a class D substance with intent to distribute in violation of G.L. c.94C, §32C (a). The juvenile filed a motion to dismiss the complaint for lack of probable cause and it was granted. The Commonwealth filed an appeal in 2014 and the Appeals Court determined that the report established probable cause. See ***Commonwealth v. Ilya I***., 84 Mass. App. Ct. 1128 (2014). The juvenile filed a petition for further appellate review and the SJC granted it.

Conclusion: The SJC held that the police lacked probable cause to charge the juvenile with distribution and the complaint was dismissed. The SJC examined the quantity and packaging of the drugs, the juvenile's association with the teenagers, the juvenile's demeanor, the odor of unburnt marijuana, the movement of the vehicle and lack of smoking paraphernalia found on the juvenile before concluding there was no probable cause.

1st Issue: Was there probable cause to charge the juvenile with possession with intent to distribute?

"Probable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." ***Commonwealth v. Stewart***, 469 Mass. 257, 262 (2014). Here, there is no dispute that the juvenile had marijuana on his person but rather the crux of the issue was whether there was sufficient basis to charge the juvenile with intent to distribute. The Commonwealth contends that when examining all these factors collectively, there was probable cause. Before rendering its decision, the SJC analyzed all the factors together.

1. Quantity and Packaging:

The SJC concluded that the thirteen individually wrapped bags of an unknown quantity of marijuana along with no description in the manner in which the bags were wrapped failed to raise an inference of intent to distribute. In prior cases, the courts have determined that the number of bags along with how the bags were packaged can raise an inference of distribution. Here, the SJC found that the amount of marijuana contained in each bag was consistent with personal use and without a weight value attached to the individual bags, and there was insufficient evidence to suggest distribution. Comparing this case to where "a few individually packaged rocks of crack cocaine do not suffice" to show intent to distribute, ***Commonwealth v. Sepheus***, 468 Mass. 160, 165 (2014). More recently, the SJC found that possession of unknown quantity of five bags of marijuana "small enough that it fit in one pocket of a pair of shorts that the juvenile wore under his pants" was insufficient to show intent to distribute. ***Commonwealth v. Humberto H***., 466 Mass. 568 (2013). Since the police incident report lacks specificity as to whether the individually wrapped bags contained amounts generally offered for sale, the SJC did not find the number of bags a compelling factor to support the Commonwealth's argument for distribution.

Additionally, the SJC noted that the police report did not indicate that the bags were wrapped in any distinct manner. The police report did not describe the packaging as consistent with drug distribution. See ***Commonwealth v. Sepheus***, 468 Mass. at 165-166 (packaging of cocaine insufficient to create inference of distribution where "there was no evidence that the three baggies in this case had been bundled or packaged in a manner that suggests they were the remains of a larger inventory"). See ***Commonwealth v. Montanez***, 410 Mass. 290, 305 (1991) (packaging of cocaine in paper folds indicative of intent to distribute); See ***Commonwealth v. Gonzales***, 33 Mass. App. Ct. 728, 731 (1992) (bundling of ten packets with elastic band indicative of intent to distribute); ***Commonwealth v. Sendele***, 18 Mass. App. Ct. 755, 758 (1984) ("distinct packaging" of drugs supported inference of distribution).

Lastly, the SJC emphasized that the officers did not observe the juvenile interact with the couple at any point during the surveillance. The juvenile's lack of interaction would further raise the question whether the juvenile knew a drug transaction had taken place. Based on the unknown quantity of marijuana and non-descript packaging along with the

juvenile's lack of interaction with the couple, the SJC concluded that there was insufficient evidence to establish that the juvenile possessed marijuana with the intent to distribute.

2. Association with teenagers:

The juvenile's interaction with the teenagers prior to the arrest amounts to mere association and did not suggest that there was any criminality. According to the police report, the police observed the couple having a "brief interaction" with the teenagers and there was no indication that the juvenile had any interaction with the couple.

While an officer does not have to observe an actual exchange, the suspect's movements must provide factual support for the inference that the parties exchanged an object." ***Commonwealth v. Kennedy***, 426 Mass. 703, 710 (1998). The police incident report does not claim there was any conduct consistent with a drug transaction. Even if the interaction with the couple during the walk may be deemed consistent with a drug transaction, the narrative lacks any specificity as to whether the juvenile was a participant. The Commonwealth concedes that the police could not prove that the juvenile was present when the alleged drug transaction may have occurred. See ***Commonwealth v. Montalvo***, 76 Mass. App. Ct. 319, 330 (2010) (where "evidence that a defendant associated with persons who committed the crime does not lead to an inference that he participated in the crime"). The SJC concluded that without some additional factors suggesting the juvenile's involvement in the criminal activity, probable cause is not supported by his mere association with the group.

3. Juvenile's demeanor:

The Commonwealth contended that the juvenile "looked nervously" at the police officer as he crossed the street and entered the vehicle. The SJC found that the description of the juvenile's apparent reaction when he knew that the police were present in the area was exaggerated because the report only states that the juvenile "walked away in a hurried manner looking back at the officers several times." Even if the juvenile's behavior could be characterized as nervous, the SJC found that it lacked value in the probable cause assessment. While nervousness in an encounter with a police officer may be factor in the probable cause analysis, see ***Commonwealth v. Sinforoso***, 434 Mass. 320, 324 (2001), it lacks force in the circumstances of this case where a sixteen year old boy is under scrutiny by the police. The SJC further stated that a juvenile's demeanor alone has little weight even though of G.L. c.94C, §32L, decriminalized the possession of one ounce or less of marijuana.

4. Odor of unburnt marijuana:

The SJC concluded that the odor of unburnt marijuana was not a significant factor in considering whether the juvenile was involved with distribution. The SJC held in ***Overymer*** that the odor of unburnt marijuana alone was insufficient to justify the warrantless search of a vehicle. ***Commonwealth v. Overmyer***, 469 Mass. 16 (2014). Similarly, the "odor of unburnt marijuana alone, does not provide probable cause to conduct a search". ***See Commonwealth v. Fontaine***, 84 Mass. App. Ct. 699, 706 (2014). The SJC found that the

odor unburnt marijuana was not a critical factor in establishing whether there was probable cause to pat-frisk the juvenile.

5. Traffic pattern of the suspect vehicle:

The SJC also concluded that the police report fails to connect how the vehicle moving from one block to another with teenage passengers was remarkable or otherwise typical of drug activity. Probable cause to believe that a crime has occurred requires something more than innocent behavior. See ***Commonwealth v. Roman,*** 414 Mass. at 643. Although the vehicle the juvenile was riding in followed two of the teenagers as they walked a block, the SJC did not find it to be significant factor in determining whether there was probable cause for distribution.

6. Lack of smoking paraphernalia:

The Commonwealth argued that the lack of smoking paraphernalia weighed against mere possession. See ***Commonwealth v.Wilson***, 441 Mass. at 401. Aside from the lack of smoking paraphernalia, ***Wilson*** had other factors such as relatively large amount of cash, a pager, a cellular telephone, and the distinctive packaging in "dime" bags that suggested intent to distribute. Additionally, "when marijuana is found in a small amount, the lack of drug paraphernalia does not detract from the inference of simple possession." See ***Commonwealth v. Humberto H***., 466 Mass. at 567-568. A person who intends only to smoke marijuana would fit the profile of the juvenile in this case. The SJC reasoned that the juveniles would need no cash, scales or evenly measured packages in amounts for simple possession.

After examining these factors collectively, the SJC found there was insufficient evidence to establish probable cause that the juvenile intended to distribute the marijuana found on his person. The SJC acknowledged that the decision was close but states that "our analysis accords greater significance to the nature and amount of the substance, and that it was possessed by a juvenile." Here, the substance was marijuana, and it was a small, undetermined amount with non-distinct packaging.

Similar to ***Humberto***, the SJC concluded that the juvenile's age detracts from the probative value that otherwise might be accorded to his nervous demeanor and his association with other young black males on a street corner. See ***Commonwealth v. Humberto H.,*** 466 Mass. at 566-567, (2013). Lastly, the odor of unburnt marijuana, traffic pattern of the vehicle and lack of smoking paraphernalia do not further prove that the juvenile's actions were indicative of distribution over possession.

- **TRAINING TIP:** This decision highlights the SJC's expectations for details in police reports. In ***Humberto***, the SJC emphasized that a nervous juvenile found possessing five plastic bags of marijuana was insufficient to establish distribution. The SJC found that the lack of weight and other specifics with regard to packaging failed to establish that the juvenile intended to distribute the marijuana. Although this was a close decision, the dissent in this decision raises some valid and legitimate concerns. According to the dissent, the majority's decision places police departments in a

quandary because the SJC is requiring more details in the reports to establish probable cause for arrest.

Commonwealth v. Humberto H., 466 Mass. 562 (2013): A fifteen-year-old juvenile was searched after arriving late to school and smelling of marijuana. When the school dean confronted the juvenile, he became "very defensive and agitated." The school dean searched the juvenile and recovered, "five plastic bags of ... what appeared to be marijuana" from the inside right pocket of "a second pair of shorts under his pants." *No drug paraphernalia including a scale, a cellular telephone or pager, empty plastic bags or cash were recovered from the juvenile.* The juvenile was arrested for possession of a Class D substance with intent to distribute, in violation of M.G.L. c. 94C, § 32C, and a delinquency complaint issued. Based on the juvenile's agitated demeanor and the recovery of the five plastic bags with what appeared to be marijuana, the juvenile was charged with distribution. The police report did not include a street value for each bag and the Court found there was insufficient information to charge the juvenile with distribution. *The Court held that without any estimate or valuation of the amount of marijuana found on the juvenile, separating the marijuana in five bags was insufficient to establish distribution.*

- **TRAINING TIP:** ***Humberto*** highlights how the lack of information in a police report can impact the outcome of a case. Without a street valuation attached to the plastic bags recovered, the Court found there was not enough evidence to prove distribution.

Commonwealth v. Keefner**,** 461 Mass. 507 (2012): The Court established that the passage of M.G.L. c. 94C, § 32L, the marijuana decriminalization statute, did not repeal the offense of possession of marijuana with intent to distribute, in violation of G.L. c. 94C, § 32C (a), where the amount of marijuana possessed is one ounce or less. Pursuant to M. G.L. c. 94C, § 32L, the act does not limit prosecution for selling any amount of marijuana. ***Keefner*** never answered whether socially sharing marijuana was considered distribution.

Commonwealth v. Dee, 461 Mass. App. Ct. 1008 (2012): During the execution of the search warrant, the police observed defendant, Dee, looking inside the residence. The police found Dee's actions suspicions and conducted a pat-frisk of him when they smelled a strong odor of raw marijuana coming from his backpack. The police searched Dee's backpack and recovered items affiliated with distribution of marijuana. Dee appealed and argued that he could not be charged with distribution because possession of less than an ounce of marijuana was decriminalized by the 2008 ballot initiative.

Conclusion: The police lawfully charged Dee with possession with intent to distribute even though the amount of marijuana weighed less than ounce. The passage of M. G. L. c. 94C, § 32L, only applies to possession. The same principles that were upheld in ***Commonwealth v. Keefner****,* applied in this case.

- **TRAINING TIP:** ***Keefner*** and ***Dee*** verified that police can charge a person with distribution of marijuana regardless of whether the amount is less than ounce. ***Commonwealth v. Keefner***, 461 Mass. 507, (2012). M.G.L. c. 94C, § 32L, states that the decriminalization of small amounts of marijuana shall not "be construed to repeal or modify" the following four categories of existing laws: those concerning "(1) the operation of motor vehicles or other actions taken while under the influence of

marijuana, (2) unlawful possession of prescription forms of marijuana, (3) possession of more than one ounce of marijuana, and (4) the selling, manufacturing or trafficking in marijuana."

Social sharing marijuana is akin to possession!

Commonwealth v. Jackson, 464 Mass. 758 (2013): *The SJC concluded that "social sharing of marijuana is akin to simple possession, and does not constitute the facilitation of a drug transfer from seller to buyer that remains the hallmark of drug distribution."* The observation by police of several individuals using and sharing marijuana in a social setting does not provide the police with justification to conduct a warrantless search, because social sharing of an ounce or less is not a crime. Unlike ***Fluellen*** where the SJC determined that distribution occurs when a defendant "serves as a link in the chain between supplier and consumer," none of those factors existed here. ***Commonwealth v. Fluellen***, 456 Mass. 517, 524-525 (2010).

Commonwealth v. Negron, 85 Mass. App. Ct. 904, (2013): After observing a drug transaction, a police officer searched the buyer and seized four (4) bags of crack cocaine from the buyer. The buyer was placed under arrest for possession with intent to distribute. Based on the drugs discovered on the buyer, the defendant, who was the seller was arrested and charged with distribution. The defendant moved to suppress the drugs found on the buyer, claiming that he has automatic standing to challenge the warrantless search of the alleged buyer relying on ***Commonwealth v. Amendola***, 406 Mass. 592, 601 (1990). The motion judge reported two questions to the Appeals Court:

> "(1) Whether a defendant who is charged with distribution of a controlled substance, has standing to challenge the warrantless search of the alleged buyer who was seized after an alleged hand to hand sale between the defendant (the alleged seller) and the alleged buyer?" and
>
> "(2) If the answer to question #1 is yes, may a defendant succeed in suppressing such evidence, regardless of whether he has a subjective or objectively reasonable expectation of privacy where the drugs were found, i.e., on the purported buyer's person, pursuant to ***Commonwealth v. Mubdi***, 456 Mass. 385 (2010)?"

The Court considered whether possession is an essential element for distribution. Pursuant to M.G.L. c. 94C, § 32A(a): "Any person who knowingly or intentionally manufactures, distributes, or dispenses or possesses with intent to manufacture, distribute or dispense [hereinafter, 'second theory'] a controlled substance . . . shall be punished." The defendant was charged under § 32A(a), and the issue was whether "distribution," under M.G. L. c. 94C, § 32A(a), contains "possession" as an essential element, such that a defendant charged with distribution under the first theory of § 32A(a) has automatic standing to contest the search of a third party. The Court determined that possession is not an essential element of the crime of distribution and therefore the defendant did not have a possessory interest. The Court answered "no" to the first question concluding that ***Commonwealth v. Garcia***, 34 Mass. App. Ct. 386, 389-391 (1993), applies and because possession is not an essential element of the crime of distribution, and therefore the defendant did not have a possessory interest in the drugs that were found on the buyer's person. Because the answer to the first

reported question was "no," the Court did not answer the second question regarding privacy. Buyer charged with possession with intent to distribute and seller charged with distribution of class. Based on the charge the seller had no standing to challenge the warrantless search of the buyer after a hand to hand sale between the two.

Commonwealth v. Stampley, 84 Mass. App. Ct. 1115, (Unpublished) (2012): Police smelled marijuana and approached the defendant sitting in the school bleaches. The officer asked the defendant and his companions what they were doing and he responded that they were smoking a bit of weed. The officer asked where the weed was and the defendant told him he threw the blunt behind him. The officer found the blunt and asked if he had anymore and the defendant replied no. *When the defendant kept looking at his backpack, the officer asked if there was anything in the backpack. The defendant told the officer he could look inside and the officer recovered thirteen bags of marijuana.* The defendant appealed arguing he was seized and should have been read his Miranda Warnings. The Court held that the officer's encounter with the defendant did not amount to a seizure. The officer approached the defendant in the bleachers which was an open area. A reasonable person would have felt they were free to leave. Since the defendant was not in custody and voluntarily consented to having his backpack be searched, no Miranda Warnings were required.

Commonwealth v. Lobo, 82 Mass. App. Ct. 803, 808 (2012): Police officer's detection of odor of "freshly burnt marijuana" following vehicle stop did not justify exit order in absence of other evidence of criminal activity.

Commonwealth v. Pacheco 464 Mass. 768, 772 (2013): A trooper's detection of "strong odor of freshly burnt marijuana," statements by vehicle's occupants that they were smoking marijuana in car, and discovery in vehicle of small bag containing a partial ounce of marijuana did not supply probable cause to search vehicle's trunk for evidence of distribution of marijuana.

Odor of Marijuana

Odor of raw marijuana alone is insufficient to search a motor vehicle.

Commonwealth v. Overmyer 469 Mass 16 (2014): *The SJC concluded that police did not have probable cause to search Overmyer's vehicle based on the odor of* ***unburnt*** *marijuana alone, after the police had seized a 'fat bag' of marijuana from the glove compartment.* Since this appeal did not address whether the seizure of a "fat bag" provided probable cause to search the vehicle, the SJC remanded the case related to that issue to District Court for additional findings.

1st Issue: Did police have probable cause to search Overmyer's vehicle under the automobile exception?

Under the automobile exception to the warrant requirement, a warrantless search of an automobile is constitutionally permissible if the Commonwealth proves that officers had probable cause to believe that there was contraband or specific evidence of a crime in the vehicle. See ***Commonwealth v. Daniel***, 464 Mass. 746, 750-751 (2013). "The ultimate touchstone for both the Fourth Amendment to the United States Constitution and Article 14 of

the Massachusetts Declaration of Rights is reasonableness." ***Commonwealth v. Townsend,*** 453 Mass. 413, 425 (2009). The Commonwealth argues that the smell of marijuana and the recovery of the "fat bag" gave police probable cause to search the back seat of the defendant's vehicle, under the automobile exception to the warrant requirement. Unlike ***Cruz*** and ***Daniel,*** the facts in the underlying case involve the smell of **unburnt** marijuana rather than burnt marijuana. ***Commonwealth v. Cruz***, 459 Mass. App. Ct. 459 (2011). According to the Commonwealth, the difference in odors of marijuana coupled with the recovery of the "fat bag" is sufficient to search the vehicle. *The SJC disagreed and emphasized that in 2008 ballot initiative and the* ***Cruz*** *case established that the odor of* ***burnt*** *marijuana alone no longer constitutes a specific fact suggesting criminality* ***Commonwealth v. Cruz*** *at 472-4. Because the odor alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime, then searching a vehicle under the automobile exception is not valid.* See ***Commonwealth v. Daniel,*** at 750-752. Furthermore, the motion judge found even though the odor involved **unburnt** marijuana, it still did not justify the officers' search of the back seat of the vehicle after the defendant surrendered the "fat bag" of marijuana from the glove compartment. The officer's belief that there was more to be found in the vehicle was merely a "hunch." There was no additional evidence to suggest that the marijuana in the "fat bag" did not itself account for the smell the officers perceived.

2nd Issue: Does the discovery of a controlled substance give probable cause to search for additional contraband in the area?

The Commonwealth contends "that it is widely accepted that the discovery of some controlled substances gives probable cause to search for additional controlled substances in the vicinity," ***Commonwealth v. Skea***, 18 Mass. App. Ct. 685, 690. Despite the proposition established in ***Skea,*** the SJC found that since the passage of the 2008 ballot which reclassified possession of less than an ounce of marijuana as a civil violation, finding marijuana does not provide probable cause to search for additional contraband. See ***Commonwealth v. Pacheco***, 464 Mass. 768, 771-772 (2013) (presence of less than one ounce of marijuana in vehicle did not give rise to probable cause to search it for additional marijuana); ***Commonwealth v. Jackson***, 464 Mass. 758, 766 (2013) (observation of defendant with marijuana cigarette did not give rise to probable cause to search person); ***Commonwealth v. Daniel***, supra at 751-752 (defendant's surrender of two small bags of marijuana totaling less than one ounce did not give rise to probable cause to search vehicle).

The SJC also addressed whether the strength of the odor implied that there could be a criminal amount of marijuana present. *Since 2008, Massachusetts courts also "have recognized the dubious value of judgments about the occurrence of criminal activity based on the smell of burnt marijuana alone, given that such a smell points only to the presence of some marijuana, not necessarily a criminal amount."* The SJC found that although the odor of **unburnt**, rather than burnt, marijuana could be more consistent with the presence of larger quantities, it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause." ***Commonwealth v. MacDonald*****,** 459 Mass. 148, 150-153 (2011). The characterizations describing the strength of marijuana are subjective. "While it is possible that training may overcome the deficiencies related to smell as a gauge of the weight of marijuana present," there is no evidence that the officers in ***Overmyer*** had specialized training that

would enable them to discern the presence of a controlled substance along with its weight. *"In sum, we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine.* In the absence of reliability, a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana, whether burnt or unburnt. …" ***Commonwealth v. Daniel,*** supra at 751, citing ***Cruz***, supra at 475-476.

- **TRAINING TIP:** The SJC never determined whether the officers had probable cause to arrest the defendant for possession of the "fat bag," nor whether the officers had a reasonable belief that the "fat bag" contained more than one ounce of marijuana.

Commonwealth v. Craan*,* 469 Mass. 24 (2014): The SJC held that the 2008 ballot initiative decriminalizing possession of one ounce or less of marijuana limits police authority to conduct warrantless searches of vehicles, even on the basis of the odor of unburnt marijuana. The Commonwealth contends that aside from the odor of unburnt marijuana, there were additional justifications as to why the search of the vehicle was valid.

Odor of raw marijuana with other factors would suffice in some circumstances for a search warrant!

Commonwealth v. Fontaine, 84 Mass. App. Ct., 669 (2014): The Court concluded that there was sufficient evidence to issue a search warrant for a vehicle search based on a number of factors. The "overwhelming" odor of **unburnt** marijuana coupled with additional factors which are included below were sufficient to issue a search warrant.

- Officer who applied for the search warrant had specialized training from the Drug Enforcement Administration along with the numerous drug distribution cases he investigated, prepared affidavits for search warrants, processed crime scenes and collected physical evidence,
- Bundles of currency discovered in the vehicle,
- Excess wiring under the dashboard,
- Packaging of the marijuana found in the center console was consistent with distribution, and
- Occupants in the vehicle had prior criminal convictions of drug offenses.

The Court found that "when an experienced officer detects an overwhelming odor of **unburnt** marijuana that is pervasive throughout the entire vehicle, and the officer reasonably believes it is inconsistent with the small quantity of marijuana that is visible in the vehicle, the officer has specific and articulable facts that support a reasonable suspicion that a crime is being committed, namely possession of more than one ounce of marijuana."

The Court failed to answer what the outcome would have been if the sole basis for the search warrant was an "overwhelming" odor of unburnt marijuana. However the Court included in its decision that *"it is reasonable to conclude that an odor of unburnt marijuana, like an odor of burnt marijuana no longer constitutes reasonable suspicion of criminal activity or probable cause without some additional fact or facts that establish a reasonable basis for the belief that more than one ounce of marijuana is in a person's possession or in the location from which the odor emanates."*

- **TRAINING TIP:** The officers' training and experience in ***Fontaine*** were critical components that the Court credited when establishing that there was sufficient evidence along with probable cause for the issuance of the search warrant. Any specialized trainings coupled with narcotics arrests and on the job experience can impact the outcome of a case.

Searching Motor Vehicles for Marijuana

The SJC holds that the police lacked probable cause to search minivan after observing marijuana weighing about an "ounce."

Commonwealth v. Sheridan, 470 Mass 752 (2015): Quincy police stopped the defendant, Matthew Sheridan, for driving a minivan with an unilluminated headlight. Sheridan was able to give the police his driver's license and registration when asked. A state trooper in the area assisted Quincy police during the stop. As the trooper approached the passenger side window, he could see a corner of a plastic sandwich bag containing marijuana, protruding from under a T-shirt on the floor. The police ordered Sheridan out of the vehicle and conducted a pat-frisk. A cell phone and $285 in cash were recovered. Sheridan told police he had nothing illegal in the vehicle and he did not consent to a search of his vehicle. Sheridan "slumped forward" with a "dejected type of look" across his face when police informed him that they saw a bag of marijuana.

Police called a k-9 unit after a number of items were found during a search of Sheridan's vehicle. Police seized a bag "consistent with about a one-ounce bag" of marijuana, partially visible under a T-shirt on the floor between the vehicle's front seats along with two additional bags of marijuana, one approximately equal in size to the first bag, and one smaller." No additional drugs, contraband or other evidence of illegal activity were recovered. Sheridan was charged with intent to distribute marijuana and his phone was seized during booking. Police searched Sheridan's phone for text messages and they found what appeared to be orders to purchase marijuana.

Sheridan filed a motion to suppress all the physical evidence seized as a result of the search and the arrest, which included the marijuana, telephone and the text messages found on the phone. Sheridan argued that the police lacked probable cause to believe that the minivan contained more than one ounce of marijuana, rendering the search impermissible. The motion was denied and the judge concluded that police can issue an exit order after they find any contraband regardless of whether includes possession of a non-criminal amount of marijuana is not criminal. Furthermore, exit orders in these circumstances allow police to seize drugs inside the vehicle without jeopardizing their safety. The judge also concluded that when

the police retrieved the initial bundle of marijuana, a second one ounce bag as well as a smaller bag were recovered which gave police probable cause to arrest Sheridan for possession of a criminal quantity of marijuana. Since the seizure of the cell phone was lawful as a search incident to arrest, the text messages were also lawful because they were a product of inevitable discovery during the investigation of whether the more than one ounce of marijuana was possessed with intent to distribute. A single SJC justice granted Sheridan's application for direct appellate review.

Conclusion: The SJC concluded that search of the minivan and cell phone violated Sheridan's fourth amendment rights and allowed the motion to suppress.

The SJC considered whether the observation of one ounce or less of marijuana was sufficient to give police probable cause to search the van. The SJC considered the following issues:

1. Whether the search of the minivan was lawful?
2. Once the marijuana was found, were police allowed to issue an exit order in an attempt to seize the drugs?
3. Could police search the text messages of Sheridan's phone without a warrant?

1st Issue: Was the search of the minivan lawful?

"Under the automobile exception, a warrantless search of an automobile is permitted when police have probable cause to believe that a motor vehicle on a public way contains contraband or evidence of a crime, and exigent circumstances make obtaining a warrant impracticable." ***Commonwealth v. Cast***, 407 Mass. 891, 901 (1990). Here the SJC examined the lineage of marijuana cases that it reviewed after a 2008 ballot initiative decriminalized possession of an ounce or less of marijuana.

In ***Cruz***, the SJC concluded that a faint odor of burnt marijuana was not sufficient to search a vehicle. ***Commonwealth v. Cruz,*** 459 Mass. at 462 (2009). Because the ballot initiative transformed the possession of one ounce or less of marijuana into a civil infraction, not a crime, the SJC found that the police could not conduct a warrantless search of vehicle because they did not have probable cause to believe a criminal amount of contraband was present. ***Id.*** at 476. Similarly in ***Daniel***, the SJC held that the police lacked probable cause to search a vehicle during a traffic stop when finding two small bags of marijuana that weighed less than an ounce. ***Id***. After reviewing ***Cruz*** and ***Daniel***, the SJC determined that the outcomes in both of those cases would control in the present case.

Here one of the police officers testified that the partially visible bag found under the T-shirt was "consistent with about a one-ounce bag" of marijuana. Because the ballot initiative decriminalized "possession of one ounce or less" of marijuana, G. L. c. 94C,§ 32L, the officer saw evidence of a civil infraction, not a criminal offense. Since the officer lacked probable cause to believe that a crime was being committed, searching the minivan was impermissible. The Commonwealth contended that the officer's training and experience allowed him to identify the amount of marijuana contained in the bag as "**about . . . one-ounce**," and could be a criminal amount of marijuana. The SJC did not agree and found that there were no facts or circumstances within the officer's knowledge that would have led a reasonable person to

believe that he underestimated the amount of marijuana contained in the bag. The police officer's estimate failed to establish probable cause and it qualifies as speculation as to the amount of marijuana within the bag.

The Commonwealth added that Sheridan's nervousness taken in conjunction with the amount of marijuana recovered tipped the scales to probable cause. As the SJC has found in prior cases, manifestations of nervous or furtive behavior, in conjunction with indications that the defendants possessed some amount of marijuana, did not establish probable cause that the defendant possessed a criminal quantity. "It is common," we observed, "and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police." See ***Cruz***, 459 Mass. at 468.

2nd Issue: Was the exit order valid in order for the police to seize the marijuana?

The motion judge found that the police were permitted to order Sheridan out of his vehicle and effect a forfeiture of the marijuana contained within the vehicle. The SJC compared a police officer's power to seize marijuana to a police officer's power to enter a vehicle in order to effect a seizure. While marijuana is "contraband" and is subject to seizure, the SJC determined that the police lacked probable cause to enter the vehicle and seize it because it was a noncriminal amount.

Plain View Doctrine

The Commonwealth contended that the seizure of the marijuana was proper because it was in "plain view." According to the plain view doctrine, a police officer may seize objects in plain view where four requirements are met: "(1) the officer is lawfully in a position to view the object; (2) the officer has a lawful right of access to the object; (3) with respect to contraband, weapons, or other items illegally possessed, where the incriminating character of the object is immediately apparent or, with respect to 'other types of evidence . . . where the particular evidence is plausibly related to criminal activity of which the police are already aware; and (4) the officer come[s] across the object inadvertently." ***Commonwealth v.White***, 469 Mass. 96, 102 (2014).

The first and fourth requirements were clearly satisfied because the officers were lawfully in a position to observe the bag of marijuana during a routine traffic stop. Second the officers came across the marijuana inadvertently. However the police did not have "a lawful right of access to the object." ***Commonwealth v. White***, supra. Although the police could see the marijuana from their vantage point outside the minivan, they did not have a "lawful right to access." The police officers had to enter the minivan in order to seize it. Because the observation of a ***noncriminal quantity of marijuana*** alone did not give rise to probable cause that the vehicle contained evidence of a crime, the validity of the officers' seizure of the marijuana turns on the existence of some other basis, besides probable cause, to justify the officers' entry into the vehicle. The Commonwealth characterized the entry into the minivan as a "limited intrusion," and maintains the entry compares to an officer requesting a driver's license and registration documentation during a routine motor vehicle stop.

The SJC did not agree and found that police may never routinely enter vehicles to acquire driver's license and registration documents, in the same way that the police enter the defendant's vehicle to seize the marijuana. Typically a police officer may "direct the driver to retrieve his identification from the vehicle." ***Commonwealth v. Lopes***, 455 Mass. 147, 160 (2009). The SJC further states that police are permitted to order occupants out of a vehicle if there is safety issue or concern that the occupants may be armed and dangerous. If there is a safety concern, police can conduct a limited search for the purposes of recovering the identification and registration documents. ***Id.*** There was no indication that the police were concerned for their safety. Rather, the record indicates the police issued the exit order and conducted a pat-frisk were solely because they observed what they believed to be a noncriminal portion of marijuana. Under these circumstances, the exit order and the pat-frisk were impermissible, and the police officers' entry into the vehicle to seize the marijuana cannot be justified under the logic that enables police officers to enter a vehicle to recover license and registration documentation in situations where the officer reasonably believes that the driver is armed and dangerous.

Finally, the SJC did not find that the officer's entry into the minivan qualified as an administrative search. Rather the SJC found that the search went beyond a "limited intrusion" for the "sole purpose of seizing marijuana in the officer's plain view." Upon entering the vehicle, the police did not merely seize the one bag of marijuana that was partially in plain view under the T-shirt but they lifted the T-shirt, and seized two additional bags. The judge made no factual finding that the officers had to lift the T-shirt to seize the bag, rather than simply grasping the portion of the bag that was partially visible.

3rd Issue: Search of the Cell Phone:

The SJC held that the search of Sheridan's cell phone was not a search incident to arrest and was not lawful. Once the SJC determined that the entry into the minivan and the seizure of the marijuana were unlawful, the police lacked probable cause to arrest Sheridan for a possession with intent to distribute. The subsequent seizure of Sheridan's cell phone was also unlawful and therefore searching the text messages was not permitted. Even if Sheridan's phone was lawfully seized as a search incident to arrest, the police would have had to obtain a warrant to search the text messages based on the Supreme Court's recent ruling in ***Riley v California,*** 134 S. Ct. 2473 (2014).

In ***Riley***, the Supreme Court explicitly held that "the search incident to arrest exception does not apply to cell phones," and that police should get a warrant.

- **TRAINING TIP**: ***Sheridan*** is a good review of when forfeiture would apply. Essentially, under forfeiture, police can take marijuana weighing less than an ounce or drugs that are potentially evidence of a crime. Medical marijuana should not be forfeited.

Cultivation of Marijuana

The SJC ruled that the police failed to provide sufficient information to establish probable cause to believe that the grower was not properly registered to possess or cultivate marijuana under the 2012 medical marijuana statute.

Commonwealth v. Canning, 471 Mass. 341 (2015): The defendant, Josiah H. Canning, was charged with possession with the intent to distribute marijuana, distribution of marijuana, and conspiracy to violate the drug laws. Canning was arrested after police executed a search warrant and found an indoor "marijuana grow" operation. Detective Kent of the Yarmouth Police Department began conducting surveillance of the property and noted that dark material obstructed the windows and that there was an aluminum flexible hose protruding out. A strong odor of "freshly cultivated" marijuana was emanating from the house and Canning along with another man had purchased "large amounts of indoor marijuana grow materials" from a "hydroponic shop."

Additionally, utility bills confirmed that the average kilowatt usage for Canning's home exceeded the kilowatt usage for three neighboring homes. Detective Kent included in his affidavit his training and experience along with details regarding marijuana growing operations. For example, different types of electrical equipment, e.g., "high intensity discharge lamps, fluorescent lights, fans, reflectors, irrigation and ventilation equipment such as aluminum flexible hose" to be operating consistently, high usage of electricity -- a "noticeable increase in kilowatt usage" -- is to be expected for marijuana grow operations. The police seized seventy (70) marijuana plants, eleven fluorescent industrial lights, an aluminum flexible hose, a digital scale, approximately 1.2 pounds of marijuana, and a large amount of cash when executing the search warrant. Canning was arrested and he filed a motion to suppress the evidence.

The motion judge allowed the motion and concluded that although Detective Kent's affidavit "established probable cause that marijuana was being cultivated indoors at Canning's home," it failed to establish that Canning was not authorized to grow marijuana in his home. When ***An Act for the Humanitarian Medical Use of Marijuana*** passed, procedural aspects regarding hardship cultivation licenses made it challenging for police to verify who was authorized to grow marijuana in their homes. Since police failed to demonstrate that Canning did not have a lawful hardship cultivation license, the motion judge concluded that Canning was not committing an illegal act. The Commonwealth filed an interlocutory appeal and the SJC allowed a motion for direct appellate review.

Conclusion: The SJC held that the police failed to establish that Canning was illegally growing marijuana in his home. The key issue that the SJC considered in the wake of the passage of ***An Act for the Humanitarian Medical Use of Marijuana***, was whether the police can obtain a search warrant for a property where they suspect an individual is cultivating marijuana by establishing probable cause that cultivation is taking place or whether police are required to establish probable cause that the individual is not registered or licensed to grow marijuana.

In 2012, ***An Act for the Humanitarian Medical Use of Marijuana***, passed and legalized the use of marijuana for medical reasons without punishment. According to St. 2012, c. 369, § 2 (I), "medical use of marijuana shall mean the cultivation, possession, processing (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transportation, sale, distribution, dispensing, or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof." The Department of Public Health is the agency that administers registrations and licenses for nonprofit medical marijuana treatment centers, medical marijuana center dispensary agents, and qualifying patients and personal caregivers that dispense marijuana for medical use. See ***Id.*** At §§ 9-12. While the language from the ***Act*** implies that nonprofit medical marijuana treatment centers or dispensaries will be the principal source for dispensing marijuana, the ***Act*** provided that qualifying patients and personal caregivers can cultivate marijuana at home under a hardship cultivation license. See ***Id.*** at §§ 2 (H), 9 (B), (C). The hardship cultivation license only allows that the patient or the patient's personal caregiver to cultivate to produce and maintain a sixty-day supply of marijuana as permitted within the Act. ***Id.*** at § 11.

1st Issue: Did police have probable cause to establish that Canning was illegally growing marijuana in his home or that he did not have a license to grow marijuana in his home?

The SJC considered the four corners of the warrant's affidavit to determine whether there was sufficient information to establish probable cause to search Canning's home. The Commonwealth argued that Canning needed a license or certification to demonstrate he was authorized to lawfully grow marijuana in his home. The Commonwealth further argued cultivating "all or any" amount of marijuana in a person's home is still illegal even under the passage of the ***Act***.

According to the language of ***An Act for the Humanitarian Medical Use of Marijuana,*** a person can lawfully cultivate a sixty day supply of marijuana as long as the person has a written certification for medical marijuana use. During the implementation of the Act, the Department of Public Health posted at memorandum entitled "***Guidance for Law Enforcement Regarding the Medical Use of Marijuana***," that stated "until the Department of Public Health can fully process hardship cultivation applications, "qualifying patients or their caregivers may conduct limited cultivation for a sixty day supply as certified by the patient's physician at their primary residence." See ***Department of Public Health, Bureau of Health Care Safety and Quality, Medical Use of Marijuana Program***. (Updated Apr. 15, 2015). Additionally, "the initial certifications for limited cultivation will remain valid until the Department of Public Health can approve or deny applications for the hardship cultivation."105 Code Mass. Regs. § 725.035(L) (2013).

The SJC also acknowledged that while "marijuana cultivation for non-medical purposes remains a crime, under G. L. c. 94C, § 32C (a), the provision of the Act c. 369,§ 7 (E), expressly permits a person or entity that is properly registered to cultivate a sixty-day supply of medical marijuana. See St. 2012, c. 369, §§ 9 (B), (D), 11. In this appeal, neither Canning nor the Commonwealth disputed the fact that the Department of Public Health was not

approving or denying applications for registration at the time police searched Canning's property and that there were no registered medical marijuana treatment centers in operation.

Second, the SJC considered whether police had probable cause to conduct an investigatory search of Canning's home because they had information he was growing marijuana there. The SJC compared the circumstances in this case to a lineage of cases that involve whether firearms may be legally possessed with a license but are illegal in the absence of one. See ***Commonwealth v. Toole***, 389 Mass. 159, 163 (1983). "The ownership or possession of a handgun or a rifle is not a crime and standing alone creates no probable cause." See ***Commonwealth v. Couture***, 407 Mass. 178, 181, cert. denied, 498 U.S. 951 (1990). Although firearms cannot legally be carried without a license to carry, see G. L. c. 269, § 10 (a), in the absence of any evidence beyond the "unadorned fact," that a defendant was carrying a gun, there is no probable cause to suspect a crime was being committed. See, ***Id***. Similarly, in the ***Marra*** case, the Court reversed a conviction charging a defendant for illegally storing dynamite without a license because the search warrant authorizing the search of defendant's trailer was not based on probable cause. See ***Commonwealth v. Marra***, 12 Mass. App. Ct. 956, 956-957 (1981). "The observation of a box containing dynamite blasting caps, without more, to indicate that their storage was unlicensed, does not provide probable cause for entry into the defendant's trailer." See ***Id. At*** 957.

The SJC concluded that the provisions of the ***Act*** "make it abundantly clear that its intent is to protect the lawful operation of the medical marijuana program established by the legislation from all aspects of criminal prosecution and punishment, including search and seizure of property as part of a criminal investigation." See ***St. 2012, c. 369, §§ 1, 3-6.*** Furthermore, the ***Act's*** medical marijuana program is structured as a licensing or registration system, and "expressly allows the lawful possession, cultivation, and distribution of marijuana for medical purposes by a number of different individuals (and certain nonprofit entities), as long as they are registered to do so." See ***St. 2012, c. 369, §§ 1, 3-6.*** When considering the ***Act***, the facts contained in the affidavit for the search warrant established only that Canning was growing marijuana on the property. Detective Kent's affidavit lacked information addressing whether Canning was registered as a qualifying patient or personal caregiver to grow the marijuana. The affidavit also fails to include other facts or qualified opinions that might supply an alternate basis to establish the necessary probable cause to believe that home cultivation was unlawful.

Based on these factors, the SJC held that the police lacked probable cause to search Canning's home. The SJC indicated that if the police had provided information that a confidential informant had recently purchased marijuana from Canning police may have been able to establish the requisite probable cause to search the property for evidence of unlawful cultivation. There was no information that police observed marijuana plants growing on the property that in the opinion of a properly qualified affiant, exceeded the quantity necessary to grow a sixty-day supply of ten ounces. Since none of these factors were included in the affidavit, the police did not have probable cause to conduct an investigatory search of Canning's home.

Cultivation of marijuana is only permitted if a person has received a hardship cultivation license under the requirements established under the medical marijuana law.

Commonwealth v. Palmer Jr., 464 Mass. 773 (2013): Officers entered the defendant's apartment in order to execute an arrest warrant. While inside the apartment, officers noticed several marijuana plants being cultivated in a closet, which collectively weighed less than one ounce of marijuana. The defendant was charged with cultivation of marijuana and a school zone violation. The district court allowed the defendant's motion to suppress concluding that a under Mass. Gen. Laws c. 94C, § 32L, a person who cultivates marijuana plants that weigh less than one ounce may not be charged with cultivation. The SJC reversed the District Court ruling, stating that the decriminalization of simple possession of less than one ounces of marijuana did not apply to cultivation of marijuana.

- **TRAINING TIP:** While cultivation of marijuana was not legalized under the ballot initiative that decriminalized possession of marijuana, it was allowed in limited circumstances with the passage of medicinal marijuana. Individuals who qualify as patients for medicinal marijuana, can apply for a hardship **cultivation license which** allows registered qualified patients to grow own marijuana if limited by financial hardship, physical incapacity, or geographic distance.

Update of Medicinal Marijuana[2]

Departments are encouraged to monitor DPH website (www.mass.gov/dph) for latest changes with medical marijuana.

An Act for Humanitarian Medical Use of Marijuana

On January 1, 2013, ***An Act for Humanitarian Medical Use of Marijuana,*** became law allowing qualifying patients with certain defined medical conditions or debilitating symptoms to obtain and use marijuana for medicinal use. The Act eliminates state criminal and civil penalties for the medical use of marijuana by qualifying patients. In order to qualify, a patient must have been diagnosed with a "debilitating medical condition" as defined in the statute and have obtained a written certification from a physician.

Who qualifies as a "qualified patient"?

- Patient must be diagnosed with a debilitating medical condition in order to qualify for medical marijuana use;
- A physician must have a "bona fide" relationship with "qualified patient" before authorizing prescription for medical marijuana;
- "Bona fide" relationship requires that physician conduct clinical visit that includes a medical history as well as the patient's current medical condition;

[2] Information regarding the changes with medical marijuana were posted on the Department of Public Health's website in the **Guidance for Law Enforcement Regarding the Medical Use of Marijuana *April 15, 2015.*** For a full copy of the memo please turn the addendum section of this guide.

- The physician must provide ongoing treatment for the "qualified patient."

❖ **TRAINING TIP:** Patients under the age of 18 require to physicians, board certified pediatrician or pediatric subspecialist to certify the medical marijuana prescription

What are the responsibilities of personal caregivers?

- Transport a registered qualifying patient to and from a Registered Medical Dispensary;
- Obtain and transport marijuana from a Registered Medical Dispensary on behalf of a registered qualifying patient;
- Cultivate marijuana on behalf of a registered qualifying patient who has obtained a hardship cultivation registration;
- Prepare marijuana for consumption by a registered qualifying patient; and
- Administer marijuana to a registered qualifying patient.

How many patients may a personal caregiver serve?

- An individual may serve as a personal caregiver for **only one** registered qualifying patient at one time, ***except in the case of:***

  an employee of a hospice provider, nursing facility, or medical facility providing care to a qualifying patient admitted to or residing at that facility, or a visiting nurse, home health aide, personal care attendant, or an immediate family

What may a patient or caregiver legally in possession of marijuana do with it?

- Marijuana that is acquired or grown for a specific qualifying patient pursuant to a physician's written certification may be used only by that patient for the medical purpose described in the written certification provided by the patient's physician.
- Patients and their caregivers are prohibited from selling, bartering, sharing, or otherwise distributing the marijuana to anyone else.

How does this impact policing?

Fraudulent use of a registration card or cultivation registration is a crime punishable by up to six months in a house of correction. However, if the fraudulent use was for the sale, distribution or trafficking of marijuana for non-medical use for profit, it is a crime punishable by up to five years in state prison or by two and one-half years in a house of correction.

The law **does not**:

a. Give immunity under federal law or obstruct federal enforcement of federal law;

b. Supersede Massachusetts laws prohibiting possession, cultivation, transport, distribution, or sale of marijuana for non-medical purposes;

c. Allow the operation of a motor vehicle, boat or aircraft while under the influence of marijuana;

d. Require any health insurer or government entity to reimburse any person for the expenses of the medical use of marijuana;

e. Require any health care professional to authorize the use of medical marijuana for a patient;

f. Require any accommodation of the medical use of marijuana in any workplace, school bus or grounds, youth center or correctional facility; and

g. Require any accommodation of smoking marijuana in any public place.

❖ **TRAINING TIP:** DPH now can regulate who qualifies as a patients and caregivers because the database is completed.

Hardship Cultivation Licenses

Chapter 369 also allows qualifying patients to apply for a hardship cultivation registration, which would allow the patient, or the patient's designated personal caregiver, to cultivate marijuana at a patient's or caregiver's primary residence for the patient's own use. Hardship cultivation licenses require DPH approval.

- **Number of Plants**: DPH has not defined a maximum number of plants that may be grown, but there should be no more than what is necessary to meet the patient's 60 day supply.

- **Location of where Plants can be Grown**: Marijuana may be cultivated and stored only in an enclosed, locked area not visible to the public at the patient's or caregiver's primary residence (not both).

- **Qualifications for Hardship cultivation licenses:** Applications for these licenses must demonstrate a verified financial hardship, physical incapacity to access reasonable transportation or lack of registered medical dispensary, (hereinafter referred to as "RMD") that will deliver marijuana to the patient's or primary caregiver's primary address. Additionally, the patient must show there is no RMD within a reasonable distance of the patient's home and that the RMD will not deliver the marijuana to the patient's or caregiver's primary residence.

❖ **TRAINING TIP:** Any caregiver or patient that has a certification for medical marijuana and is registered with the DPH, can grow marijuana at home.

Registered Medical Dispensaries[3]

- Non-profit corporations that received approval from DPH after submitting an application
- RMDs can cultivate, process and dispense marijuana and marijuana infused products
- RMDs may only sell to registered patients or caregivers
- Can deliver to a patient's or caregiver's home
- If patient has a verified hardship, must provide a discount for the marijuana
- RMDs have strict security which will include 24 hour security and allow access only to employees, patients, caregivers and other authorized personnel
- No one can enter RMD without a valid registration
- Seed to sale tracking is required

❖ **TRAINING TIP**: Alternative Therapies Group, the first RMD officially opened in Salem, Massachusetts on June 24, 2015.

Measurements of 60 Day Supply

DPH has defined a 60-day supply of marijuana to be 10 ounces, or the equivalent in other forms (such as edible marijuana-infused products). A physician may certify a prescription for more than 10 ounces in some circumstances. The certification for medical marijuana use can be valid for 15 days to a 1 year.

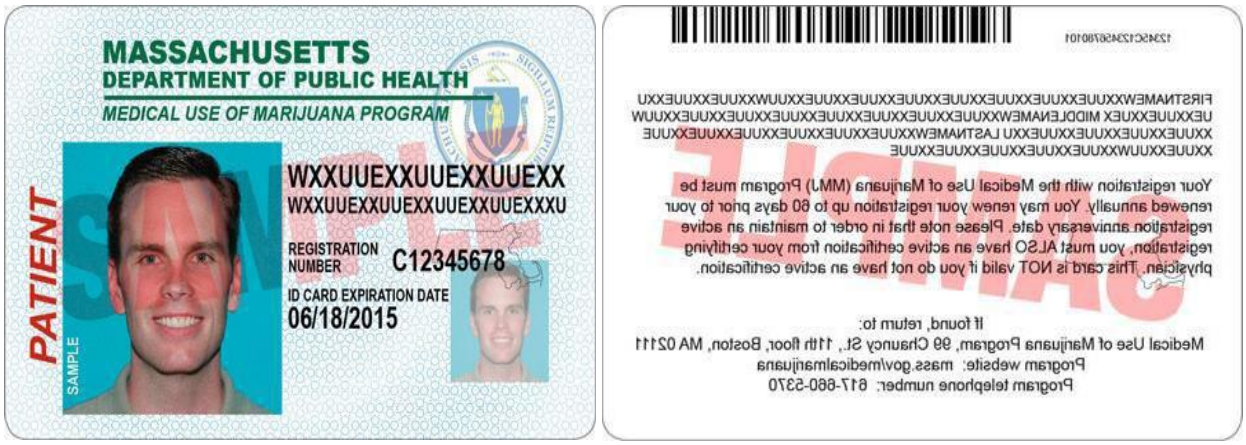
To determine what the equivalent amount of a 60 day supply is for marijuana concentrate (oil) and resin (hash) DPH has determined that marijuana plant material will, on average, yield 15% of its weight in concentrate or resin. Thus, to determine the equivalent weight of a concentrate or resin multiply the weight of the oil/resin by 6.7 to determine the dry weight equivalent.

Amount of Resin-Concentrate	**Constant 6.7 (1÷.15)**	**Equivalent to Marijuana Plant Material**
1.8 Ounces	x 6.7	12 Ounces Marijuana Plant Material
1.5 Ounces	x 6.7	10 Ounces Marijuana Plant Material
1.2 Ounces	x 6.7	8 Ounces Marijuana Plant Material
.9 Ounces	x 6.7	6 Ounces Marijuana Plant Material

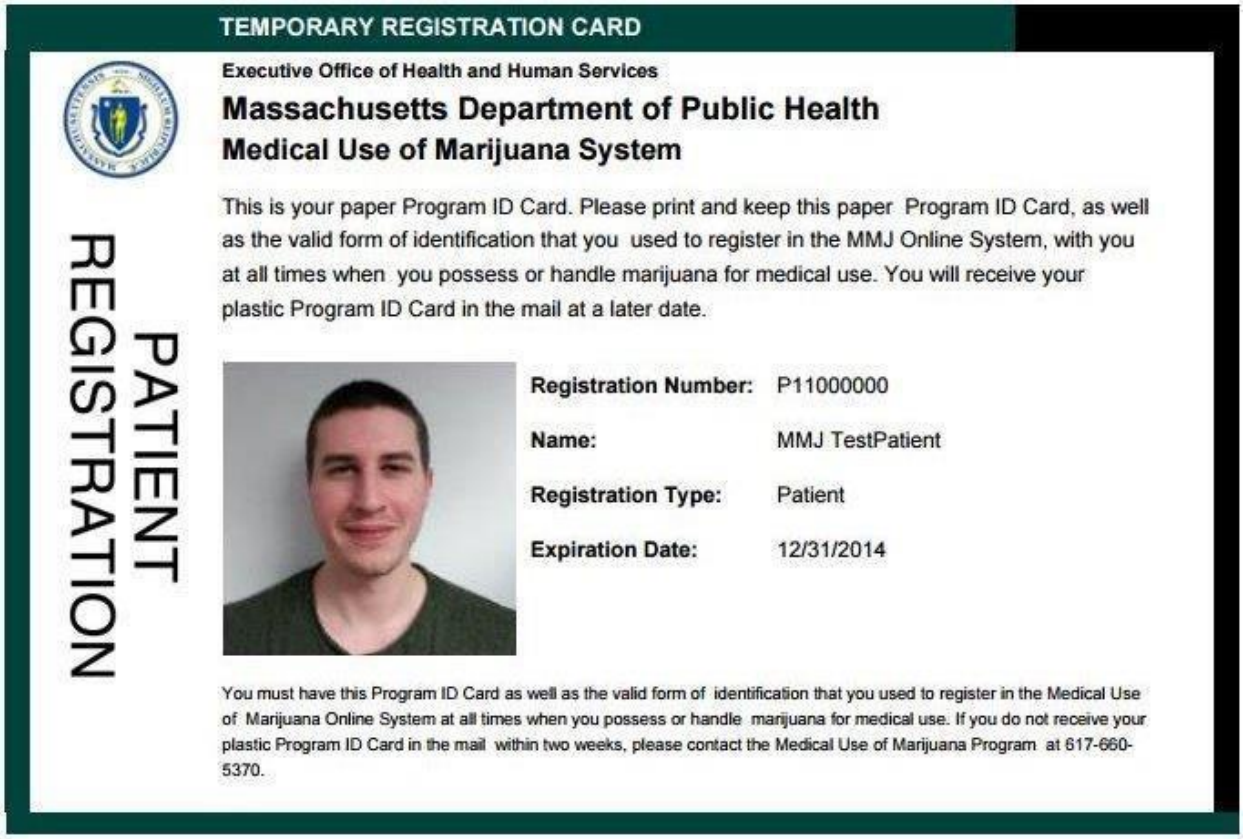
[3] Updated information for medical marijuana was produced from the Department of Public Health.

.6 Ounces	x 6.7	4 Ounces Marijuana Plant Material

Program Identification Card



Temporary Program Identification



Procedure to Verify Medical Marijuana Registration:[4]

1. Police can access Medical Use of Marijuana Online System ("MMJ Online System") through their existing accounts with the Massachusetts Criminal Justice Information System ("CJIS") to verify patients, caregivers and dispensary agents. The online registration system is accessible 24/7 for law enforcement.

2. See Below for instructions posted on the Department of Public Health's website and also there are instructions listed under "Law Enforcement FAQ for MMJ Online System:

   http://www.mass.gov/eohhs/docs/dph/quality/medical-marijuana/lawenforcement-faq-mmj-online-system.pdf.

How can law enforcement access information that is not provided in the MMJ Online System?

To initiate a request for information on a registered patient, caregiver, dispensary agent, or RMD that is not provided by CJIS, law enforcement officers may telephone the Medical Use of Marijuana Program at (617) 660-5370. When calling, please have the following information prepared:

- Name of the law enforcement officer;
- Title of the law enforcement officer;
- Name of the law enforcement agency at which the law enforcement officer works;
- Phone number to contact the law enforcement officer;
- Description of what the law enforcement officer is calling about;
- The name of the individual the law enforcement officer is inquiring about; and
- The Medical Use of Marijuana Program registration number of the individual the law enforcement officer is inquiring about (if available).

NOTE: No information will be provided to the law enforcement officer until DPH has verified that the request is made pursuant to a legitimate law enforcement inquiry and that information requested may be appropriately disclosed.

When can law enforcement look up a MMJ registrant through the online registration system?

1. If registrant has MMJ registration ID card, law enforcement officer can look up by the registration's last name.

2. If registrant does not have MMJ registration ID on his/her person, law enforcement officer should enter registrant's full name, date of birth and mother's maiden name to verify.

[4] See www.mass.gov/medicalmarijuana for additional questions regarding the medical marijuana program.

What information does law enforcement access through the system regarding patients or caregivers?

- Name, registration number and photo of registrant
- Status of registration: active (currently registered and authorized to have medical marijuana) or inactive (not qualified to have medical marijuana
- Amount of marijuana patient can use
- Whether the patient has a hardship cultivation license which would include expiration date of the license and address of the cultivation.

What information does law enforcement access through the system regarding RMD agents?

- Name, registration number and photo of RMD agent
- Status of RMD agent: active (currently authorized to handle medical marijuana) or inactive (not qualified to handle medical marijuana
- Name and address of the RMD that the RMD agent works
- If RMD agent is employed at multiple RMDs, the RMD agent will have multiple registration numbers and registration identification cards.

School Zones

G. L. c. 94C, § 32J excludes playgrounds located on private property, even if accessible to members of the public.

Commonwealth v. Gopaul, 86 Mass. App. Ct. 685, (2014)**:** The Court held that G. L. c. 94C, § 32J excludes playgrounds located on private property, even if accessible to members of the public. ***Privately owned playgrounds fall outside the scope of § 32J.*** Even if a privately owned playground is open to the public, it still falls outside the scope of the statute.

- **TRAINING TIP*:*** One provision of the Three Strikes Law also known as Melissa's Bill which passed in 2013 changed the time and measurements of school zones. Essentially the school zone violation does not apply from the hours of midnight to 5 AM and the distance for the school violation has been reduced from 1000 feet to 300 feet and **must be within 300 feet of a public or private accredited pre-school, elementary, vocational, high school or other qualifying institution.**

II. FIREARMS AND NEW TRENDS

HYPOTHETICAL: Natick Police Officer Jack Ryan was dispatched to Route 9 in front of the Natick Mall for a road rage incident. Upon arrival, Officer Ryan spoke with the victim who told him that he was driving in the right lane on Route 9 when he attempted to switch lanes. The victim noticed a black BMW with its lights on and beeping its horn. The BMW pulled parallel to the victim's vehicle and a white man with a goatee pointed a gun at him. The victim panicked and slammed on his brakes. He was able to record the license plate number. Officer Jack Ryan located the suspect at the Whole Foods in Framingham and spoke with him. The suspect said he has Class A LTC because he is a firearms dealer. In light of the new gun bill that passed in 2014, what can Officer Ryan charge the suspect with?

DISCUSS OPTIONS: Although there is no specific provision for road rage in the new gun bill, one of the offenses Officer Ryan could charge the suspect with is Assault by a firearm under G.L. c. 265, § 15E.

Update on An Act to Reduce Gun Violence:

On August 13, 2014, the Governor signed into law **H. 4376** "***An Act to Reduce Gun Violence H. 4376."*** This new legislation of **Chapter 284 of the Acts of 2014** took effect immediately.

Key Parts of Gun Violence Bill

A. Revisiting Four (4) New Offenses:

1. Assault and Battery by a firearm

M.G.L. c. 265, § 15F – Whoever commits an Assault & Battery By Means of Discharging a Firearm, sawed- off shotgun or machine gun as defined in M.G.L. c**.** 140, §121.

Right of Arrest: Felony
Penalty: 20 year state prison or not more than 2 ½ in HOC or fine of 10k or both.

2. Assault by a firearm

M.G. L. c. 265, § 15E – Whoever attempts to commit an assault and battery upon another by means of discharging a firearm, rifle or shotgun, sawed-off shotgun or machine gun as defined in M.G.L. c**.** 140, §121.

Right of Arrest: Felony
Penalty: 15 year state prison or not more than 2 ½ in HOC or fine of 10k or both.

3. Deceptive Weapon

M.G.L. c. 265, § 58 **-** Anyone in possession of a "deceptive weapon device" (defined in c. 140, § 121 as a weapon intended to convey the presence of a firearm, used in the commission of a violent crime and presenting an objective threat of immediate death or serious bodily harm to

a person of reasonable and average sensibility) shall be deemed to be armed. (Effective immediately in part and Section 87 effective January 1, 2015)

4. Disarming Police Officer

M.G.L. 265, § 13D - Attempt to disarm a police officer in performance of the officer's duties and it does not specify whether this related only to firearm or if it includes any weapons carried by law enforcement.

> **Right of Arrest**: Felony
> **Penalty:** shall be imprisoned for not more than 10 years or by a fine of $1000 or imprisoned in HOC for not more than 21/2 years.

B. Charges with Firearms Near Schools

HYPOTHETICAL: Johnny Smith is a student at Northeastern and he has been taking karate and other martial art classes. He was hoping to attain his black belt but needed to pass at test to do so. Johnny brought his samuri sword to school in a sheath and walked across campus. Johnny never alerted school administrators that this was part of his requirement for his ancient studies class. Northeastern police received a dispatch that there was a man carrying a sword across campus? What can they do?

DISCUSS OPTIONS: Firearms Legislation does not extend warrantless arrest to police for dangerous weapons such as a sword. However, it does permit police to detain Johnny. Northeastern may impose separate discipline according to school policies.

Dangerous Weapons on School Grounds

M.G.L. 269, § 10(j) – Whoever not being law enforcement carries on his or her person a firearm, (includes a pistol, revolver, rifle or smoothbore arm from which a bullet or pellet can be discharged) loaded or unloaded or other dangerous weapon in any building on the grounds of any elementary or secondary school, college or university without written authorization of the board or person in charge, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may *arrest without a warrant* and detain a person found ***carrying a firearm*** in violation of this paragraph.

- **TRAINING TIP:** This part of the legislation expands how police can respond if there is a report that there is a person with a firearm on school grounds without written authorization. Police **can** make the warrantless arrest and detain a person in violation of carrying **a firearm** on school grounds without written authorization. The legislation is unclear with regard to how this would apply to off duty police officers. However, this expanded provision does not authorize retired police officers to carry without written authorization. Written authorization can come from the superintendent of principal of a school.

Searches on College Campus

Commonwealth v. Whitehead, 85 Mass. App. Ct. 134 (2014): The Court held that the discovery of ammunition found in **plain view** inside a vehicle parked on a college campus along with additional factors justified conducting a pat-frisk of the defendant and searching his backpack. Security officers from Cape Cod Community College reported that officers they observed ammunition in **plain view** inside a locked Jeep in a college parking lot. Local police were dispatched and identified the vehicle in the parking lot that had "Kill 'Em All Let God Sort It Out" and "Sniper No Need to Run--You'll Only Die Tired," decals attached to the vehicle along with a sign that said "Funeral," hanging in the rearview mirror. There were also three (3) rounds of ammunition for a semiautomatic weapon--a nine millimeter round, a .38 caliber round, and an empty nine millimeter shell casing and a camping knife visible on the center console of the vehicle.

Enhanced Penalty for Improper Storage of Firearms

M.G.L. c 140, § 131L – Penalties and fines have increased for both the misdemeanor and felony versions involving this offense.

What are you required to have in a vehicle? Do you need a trigger lock?

Commonwealth v. McGowan**,** 464 Mass. 232 (2013): The Court held that that individuals who have a valid License to Carry a firearm are required to properly store their firearms even in their own home. McGowan was charged for violating G.L. c.140, § 131(L) (a) for failing to properly store a loaded firearm in a locked container or equipped with a safety device that renders the firearm inoperable by anyone other than the owner or other authorized user.

Commonwealth v. Reyes**,** 464 Mass. 245 (2013): Although the SJC did not define what qualifies as a "secured locked container" it did list that "at a minimum, to be secure, any qualifying container must be capable of being unlocked only by means of a key, combination, or other similar means." 18 U.S.C. §921 (a)(34) (c) (2006) (requiring "secure gun storage or safety device" be designed to unlock only by means of key, combination or other similar means). It was clear from the SJC's holding that a "motor vehicle itself would not qualify as a secured locked container under M.G.L. chapter 140 § 131 (L) (a). Whether a storing a firearm in a locked glove compartment within a car that is alarmed and locked qualifies as "secured locked container," was left unanswered. M.G.L. chapter 140 § 131 (L) (a) "does not bar the defendant from carrying a firearm on his person or under his control without a trigger lock or the need to secure it in a locked container either inside or outside of a motor vehicle." The storage statute ***only*** imposes restrictions when the firearm is not in the gun owners' possession or control and therefore it is does not interfere with an individual's second amendment right to bear arms.

Self Defense Spray does not require a FID card unless you are under the Age of 18.

Definition: G.L. c. 140, § 122C: "chemical mace, pepper spray or any device or instrument which contains, propels or emits a liquid, gas, powder or other substance designed to incapacitate, is now referred to as "self-defense spray."

Requirements: A person over 18 does not need an FID card to possess or purchase self-defense spray. Firearms dealers shall verify age of person buying spray.

Violations Involving Self Defense Spray

Selling self-defense spray (includes chemical mace, pepper spray etc.) without a firearms dealers license

M. G.L. c. 140, § 122C(b)

Right of Arrest: Misdemeanor summons
Penalty: Not more than two years in HOC or a fine of $1000.

Self Defense Spray Violations Involving Minors

a. Selling self-defense spray (includes chemical mace, pepper spray etc.) to a person under age 18 and does not have a FID card

M.G.L. c. 140, § 122C(c)

Penalty: $300 fine

b. Minor possessing self-defense spray with not FID card

M.G.L. c. 140, § 122C(d)

Penalty: $300 fine

Disqualified person unlawfully possessing self-defense spray

M.G.L. c. 140, § 122D

Right of Arrest: Misdemeanor summons
Penalty: Not more than two years in HOC or a fine of $1000.

Miscellaneous Provisions:

Exemptions for Police Regarding Large Capacity Weapons: Police officers are exempt from the prohibition on large capacity magazines or assault weapons not lawfully possessed in 1994. The previous version exempted "the possession by a law enforcement officer for purposes of law enforcement."

New Licensing structure: Effective January 1, 2021, there will be no distinction between eliminates Class A and Class B LTC.

Types of Firearms

Stun gun does not qualify as a firearm under the Second Amendment!

***Commonwealth v. Caetano*,** 470 Mass. 774, (2015): In 2011, Ashland police officers were dispatched to a supermarket for a possible shoplifting. Upon arrival, the supermarket manager directed police to a man who was standing next to a motor vehicle in the parking lot. The

police approached the vehicle and located the defendant, Jaime Caetano, who was sitting in the passenger seat. Caetano consented to police searching her purse and they recovered a stun gun. Caetano told police that she kept the stun gun as protection from her ex-boyfriend. In Massachusetts, since private citizens are prohibited from possessing a stun gun police charged Caetano with violation of G. L. c. 140, § 131J for possessing a stun gun. Caetano filed an appeal arguing that under G.L. c. 140 § 131J a stun gun should be considered an "arm" for purposes of the Second Amendment and is a weapon used primarily for self-defense. Caetano's motion was denied and the case went to trial. Although a judge found Caetano guilty of illegally possessing a stun gun, the case was placed on file. A few months later, Caetano filed a motion challenging the disposition of her case. A district court judge heard the motion and Caetano's right of appeal was preserved. The SJC agreed to hear the case through direct appellate review.

Conclusion: The issue before the SJC was whether the Massachusetts ban on stun guns violates the Second Amendment. The SJC concluded that G. L. c. 140, § 131J, does not violate the Second Amendment right articulated in ***Heller*** and it affirms Caetano's conviction for possession of an electrical weapon in violation of G. L. c. 140, § 131J. Pursuant to MGL c. 140, § 131J, "it is illegal to possess a private "portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill" except by specified public officers or suppliers of such devices, if possession is "necessary to the supply or sale of the device or weapon" to agencies utilizing it. Anyone who violates this section can face a fine or potentially imprisonment in the House of Correction. Although Caetano argued that the stun gun was used for protection outside of the home, it should be permitted under ***Heller,*** the Court did not agree. **See *Hightower*** 693 F.3d at 72 & n.8, quoting ***Heller***, 554 U.S. at 627.

The second issue the SJC had to consider is how a stun gun would be categorized. Since the stun gun is not a firearm that was around when the Second Amendment was enacted would it be designated as a firearm or dangerous weapon per se. According to the statute, a stun gun is "a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure, or kill." G. L. c. 140, § 131J. From this statutory definition, we easily conclude that any weapon regulated by § 131J would be classified as dangerous per se at common law. Accordingly, we consider the stun gun a per se dangerous weapon at common law. Because the stun gun that the defendant possessed is both dangerous per se at common law and unusual, but was not in common use at the time of the enactment of the Second Amendment, the SJC concluded that the stun guns fall outside the protection of the Second Amendment. See ***Heller***, 554 U.S. at 622, 627.

Curtilage and Driveways

The Appeals Court concludes that a driveway is 'curtilage' even though not specified in search warrant!

Commonwealth v. Vick, 87 Mass. App. Ct., 1127(2015): The police searched the defendant's car while he was incarcerated on other charges. At that time, it was parked in a private driveway at the duplex apartment building where his father lived. Police had obtained a

search warrant for the father's residence to look for firearms that the father may have been storing for his son. The warrant covered not only the father's apartment (the entrance to which was on the right side of the building), but also "common areas, the basement, the curtilage, detached structures, and the motor vehicle within the curtilage (driveway) of the target [the defendant's father]." The vehicle referenced in the warrant (and underlying application) was the father's car, which was "parked at the top of the driveway closest to the street." The defendant's car was parked in the far back of the driveway, in front of a wooden stockade fence that appears to serve as the back border of the property.

The defendant filed a motion to suppress and argued the search of his car was outside the scope of the search warrant. The judge found that the driveway was within the curtilage of the premises even though the defendant's car was not specifically referenced in the search warrant. See ***Commonwealth v. Signorine***, 404 Mass. 400, 403–404 (1989). The defendant further appealed arguing that the entrance to the father's apartment being "on that side of the building closest to the driveway, was wrong." Since there was a mistake of fact, would that impact the judge's conclusion that the driveway was within the curtilage of the building? The defendant was convicted of unlawful possession of a rifle, unlawful possession of a large capacity weapon, unlawful possession of a large capacity feeding device, receiving a firearm with knowledge that its identification number had been defaced, and receiving stolen goods (a checkbook).

Conclusion: The Appeals Court denied the motion to suppress. Similar to ***Commonwealth v. Fernandez***, 458 Mass. 137, 141–145 (2010), where the driveway was within the curtilage of a three family house, here, driveway runs from the street, alongside the duplex house to the back yard. Although the driveway is narrow and it lies within wooden fences, the property is demarcated from other lots in the area (an effect that is not undone by the fact that a visually porous chain link fence lies between the driveway and the front yard of the house). At the time various photographs that were taken show, the father's car was parked at the end of the driveway, preventing others from being able to access it.

"Suitability for LTC" in Massachusetts

Chief of Police of the City of Worcester v. Raymond J. Holden, Jr. 470 Mass. 845, (2015)***:*** The Worcester Chief of Police determined that Raymond J. Holden (hereinafter referred to as "Holden") was not a "suitable person" to hold a License to Carry Firearms (LTC) due to his history of domestic violence. Holden appealed arguing that the Chief violated his due process rights under the Second Amendment

The SJC heard the case on appeal and determined that the Chief's decision to deny was not arbitrary and capricious. Holden's firearms application was up for renewal, five years after the domestic abuse incident, The Chief denied issuing Holden a license because of Holden's "violent proclivities, anger management issues and poor decision-making," from a domestic incident that had occurred five year earlier.

The SJC further held there is no definitive period of time must pass before the Chief may no longer consider an incident when deciding whether to issue a firearms license. The SJC added that Holden could have sought a professional evaluation, and, if necessary, treatment,

and provide the appropriate documentation to the chief to alleviate his legitimate concerns about Holden's unsuitability. However, there is no evidence in the record to suggest that Holden did that.

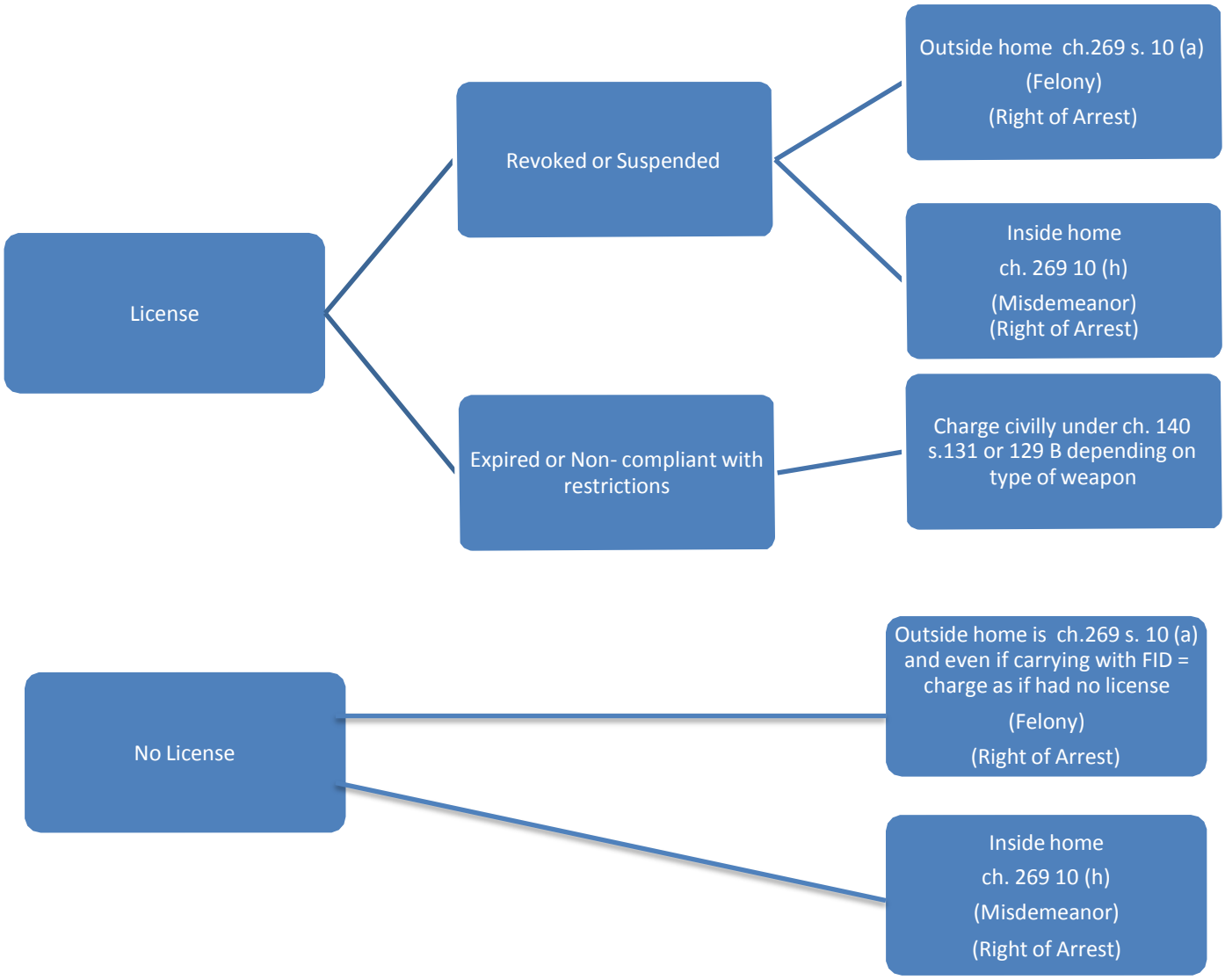
The SJC concluded that the facts in the record do not show that the Chief's decision was arbitrary or capricious or that it was heavy-handed. To the contrary, the District Court judge found after an evidentiary hearing that in approximately six years since 2006, the Chief granted approximately 3,200 applications for licenses to carry and denied or suspended approximately 200 such applications and licenses." Based on all the facts of the record, the SJC found that absent any evidence that the Chief's decision was arbitrary and capricious, it is within the Chief's authority to deny issuing a firearms license based on suitability grounds.

An individual with Class A unrestricted license to carry firearms does not have to conceal the firearm in public.

Firearms Records Bureau v. Simkin, 466 Mass. 168 (2013): The SJC held that because Simkin held an unrestricted Class A license to carry firearm with no restrictions he was allowed to carry firearms "for all lawful purposes." G. L. c. 140, § 131 (a) including into a medical office. Simkin's decision to carry his firearms to his medical appointment did not make him unsuitable to have a License to Carry. The SJC stated that the medical staff's claim that Simkin caused alarm because he was "heavily armed" was meritless." Simkin is not responsible for alarm caused to others by his mere carrying of concealed weapons pursuant to a license permitting him to do so and therefore his license should never have been revoked for suitability issues.

Charging Violations of Firearms Law

Note: These charges apply to handguns, rifles and shotguns. Also, if an individual is carrying a handgun with only a FID card, the correct charge ch. 269 s. 10 (a) violation.



Firearm Violations

Statutes		
M.G.L. c. 269, § 10(a) **Non- large capacity firearms**	• Knowingly possessing a non-large capacity firearm in a vehicle or in public without a license. Also 10(a) includes common area of apartment or business because not under one's exclusive control	• Felony • 1-2 ½ years in HOC or 2 ½ - 5 years in state prison • Right of arrest
M.G.L. c. 269, § 10(b) **(dangerous weapons)**	Whoever knowingly possesses dangerous weapons (See M.G.L. 269 § 10 (b) for extensive list of knives, wooden weapons, brass knuckles, etc.)	• Felony • 2 years in HOC or fine • Right of arrest
M.G.L. c. 269, § 10(c) **(machine guns and sawed off shotguns)**	Whoever knowingly possesses a **machine gun** or a **sawed-off shotgun** without a license/permit.	• Felony • Up to life in state prison • Right of arrest
M.G.L. c. 269, § 10G **(Armed Career Criminal Act)**	(a) Whoever, having been previously convicted of a violent crime or of a serious drug offense or both.	• Felony • state prison for not less than 3 years nor more than 15 years • Right of arrest
M.G.L. c. 269, § 10(h)(1) **Non-large capacity firearms**	Knowingly possessing a non-large capacity firearm in one's house or place of business.	• Misdemeanor • Up to 2 years in HOC • Excludes common areas of apartments, multi dwelling units and a person's workplace
M.G.L. c. 269, § 10H **Impaired**	Whoever carries a loaded firearm, while under the influence of alcohol or marijuana, narcotic drugs, depressants or stimulants.	• Misdemeanor • No statutory right of arrest • 2 ½ years in HOC or a fine
M.G.L. c. 269, § 10(n)	(n) Whoever carries a **loaded** firearm in public sawed off shotgun or loaded machine gun. Applies to 10 (a) and 10 (c) charges.	• "Loaded" means ammunition is contained in the weapon or within a feeding device attached thereto. • Cannot charge for unlawful possession of ammunition and 10 (n) because duplicative. • Added charge

III. DOMESTIC VIOLENCE AND SEXUAL OFFENSES

Revisiting An Act To Reduce Domestic Violence

Chapter 260 of the Acts of 2014*:* On August 8, 2014, the Governor signed into law "***An Act Relative to Domestic Violence."*** This new legislation takes effect immediately. There are two aspects of the law that include training requirements and the fatality review team that will become effective in 2015. The key aspects of the bill are listed below. The first portion of this update will highlight the aspects of the bill that impact police.

A. New Offenses

HYPOTHETICAL
Johnny Smith and his brother Charlie share an apartment in the Ink Block. Johnny has been known to indulge in a few cocktails at JJ Foleys on Harrison Ave. One night he returned to the apartment and found out that his brother had totaled his car. Johnny started beating up his brother and neighbors called police. When police arrived they arrested Johnny for domestic assault and battery and charged him. What would be the appropriate charges?
c. 265 15 (d) or 265 13 (a)?

Answer:
The domestic violence bill establishing that family members who live in the same house, but are not intimate partners, would be charged under G.L. c. 265, § 13 (a) and not new the offenses of G.L. c. 265, §13M (a) or (b).

The new legislation adds two new offenses:

1. M.G.L. c. 265, § 13M (Domestic Assault or Domestic Assault and Battery), and

2. M.G.L. c. 265, § 15D (Strangulation or Suffocation).

1. Domestic Assault or Domestic Assault and Battery

Mass. Gen. Laws c. 265, § 13M, created the offenses of Assault or Assault and Battery on *family or household members* who are involved in "intimate relationships." Section 13M, defines "family and household members" as:

a. persons who are or who were married to one another;
b. persons who have a child in common;
c. persons who have been in a "*substantive dating relationship;*" or
d. persons who are in an engagement relationship.

In determining a "substantive dating relationship," the court will consider the following factors:

a. the length of time of the relationship;

b. the type of relationship;

c. the frequency of interaction between the parties; and

d. if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

The new legislation does not change or alter "family or household members" as defined by Mass. Gen. Laws ch. 209A, § 1. However, it excludes persons who are or were residing together in the same household or are or were related by blood or marriage.

Section 13M does not contain an aggravated form of Domestic Assault or Domestic Assault and Battery and does not change M.G.L. c. 265, § 13A. Police can still arrest roommates, people living in the same household or blood relatives for domestic assault and battery or aggravated assault and battery for Assault, Assault and Battery, Aggravated Assault, or Aggravated Assault and Battery under M.G.L. c. 265, § 13A (a), or § 13A (b), respectively.

Penalties:

First Offense: Imprisonment in the House of Corrections for not more than 2½ years or fine of not more than $5,000, or both;

Second Offense: Imprisonment in the State Prison not more than 5 years or in House of Corrections for not more than 2½ years.

The law mandates, upon conviction or a continuance without a finding (CWOF), the completion of certified batterer's program unless the court finds that provision is not suitable.

2. Strangulation or Suffocation

M.G.L. c. 265, § 15D, created the felony offenses of Strangulation and Suffocation. The following definitions apply to:

Strangulation: Is the intentional interference of the normal breathing or circulation of blood by applying substantial pressure on the throat or neck of another.

Suffocation: Is the intentional interference of the normal breathing or circulation of blood by blocking the nose or mouth of another.

Penalty: Imprisonment in State Prison for not more than Five (5) years, or in the House of Corrections for not more than 2½ years or a fine of $5,000 or by both. Also, upon conviction or receiving a continuance without a finding (CWOF), the defendant must complete a Certified Batterer's Program *unless the court makes "specific written findings" of why not suitable.*

Aggravated Strangulation or Suffocation

(i) Whoever strangles or suffocates another person and by such strangulation or suffocation *causes serious bodily injury*.[5]

[5] Serious bodily injury is defined as bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ or creates a substantial risk of death.

(ii) Strangles or suffocates another person, who is pregnant at the time of such strangulation or suffocation, knowing or having reason to know that the person is pregnant.

(iii) Is convicted of strangling or suffocating another person after having been previously convicted of the crime of strangling or suffocating another person under this section, or of a like offense in another state or the United States or a military, territorial or Indian tribal authority; or

(iv) Strangles or suffocates another person, with knowledge that the individual has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued under sections 18 or 34B of chapter 208, section 32 of chapter 209, sections 3, 4 or 5 of chapter 209A or sections 15 or 20 of chapter 209C, in effect against such person at the time the offense is committed.

Penalty: Imprisonment in state prison for not more than 10 years, or not more than 2½ years in the House of Corrections, or a fine of not more than $10,000 or both. Also, upon conviction or receiving a continuance without a finding (CWOF), the defendant must complete a Certified Batterer's Program *unless the court makes "specific written findings" of why not suitable.*

B. Procedures for Service of Abuse Prevention Orders

The new law requires police to inform the defendant of the charges for an arrest involving domestic violence and the law also *requires police to provide the defendant with additional resources including information about batterer's program, alcohol abuse, substance abuse and financial counseling programs located within or near the court's jurisdiction.*

- **TRAINING TIP:** Because programs vary regionally, it may be helpful to contact the district attorney's office or court in your jurisdiction to find if there is a form or list of resources that police can provide to the defendant.

C. Jurisdiction

The District Court has jurisdiction over kidnapping pursuant to M.G.L. c. 265, § 26 and over strangulation pursuant to M.G.L. c. 265, § 15. There are some charges of kidnapping that are outside of District Court jurisdiction. For example, kidnapping for ransom, under M.G.L. c. 265, § 26, 1-2, kidnapping combined with sexual assault, M.G.L. c. 265, § 26, 3, or kidnapping of a child under sixteen years old, M.G.L. c. 265, § 26, 4, all remain outside of District Court jurisdiction.

D. Confidentiality and Police Logs

The new law expands the confidentiality of domestic violence reports and designates the reports not public record under M.G.L. 41, § 97 D.

Non-public record:

- Reports of rape and sexual assault
- Attempts to commit such offenses

- Domestic abuse by family or household members as defined by c. 209A
- Any communications between victims and police are supposed to be kept confidential
- Any responses involving reports of domestic violence, rape or sexual assault
- Any entry concerning the arrest of a person for assault, assault and battery or violation of a protective order where the victim is a family or household member
- Handicapped individuals who are physically or mentally incapacitated to a degree that person may be confined to a wheelchair or bedridden or need a mobility device to move around
    - ❖ Only victims and police have access to these reports pursuant to G.L. c. 41 §97D
    - ❖ Victims' attorney, da's office, victim witness advocates or someone specifically identified by the victim could have access to the reports
    - ❖ Reports involving domestic violence are only accessible at reasonable times upon written, telephonic, facsimile or electronic mail request to law enforcement officers, district attorneys or assistant district attorneys and all persons authorized in making bail determinations.

Requirements for Police Concerning Police Logs under G.L. c. 41 § 98F:

- Must exclude above information
- Police departments along with colleges or universities where officers are appointed must keep a separate non-public log of entries concerning responses to reports of domestic violence, rape or sexual assault or any entry concerning the arrest of a person for assault, assault and battery or violation of an abuse prevention order where the victim is a family or household member as defined by M.G.L. c. 209A § 1. These entries are not public record and shall not be disclosed to the public. Additionally, any entry regarding a handicapped individual who is physically or mentally incapacitated or bedridden shall also be kept in a separate daily log and not disclosed to the public.

Penalty for Violation:

- $ 1000 fine or imprisonment for not more than a year.

    - ❖ **TRAINING TIP:** Although the legislation does not appear to extend confidentiality of police reports once the defendant is arraigned in open court, it is recommended that police departments continue to regard these reports as confidential. As always, please consult with your supervisor or your department's legal advisor or prosecutor, for specific guidance on the application of these cases or any law.

E. Bail:

G.L. c. 276, § 57 adds a provision that any individual arrested for domestic violence cannot be released on bail for **6 hours**, unless a judge releases a defendant in open court. This 6 hour nonbailable period applies for any person 18 years or older arrested for violating a protective order, or any act that would constitute abuse as defined by 209A and strangulation/suffocation (265, 15D). G.L. c.276, 57 is not changed and still regards arrestees charged with violation of a protective order, or "a misdemeanor or felony involving abuse as defined by 209A while an order of protection issued under 209A was in effect," as nonbailable offenses.

All individuals involved in making bail determinations regarding defendants arrested for domestic violence shall have access to any information necessary in determining bail. Additionally, police are required to make a reasonable attempt to notify the victim if the defendant is released. The district attorney's office is also required to notify the victim if the defendant is released by the court.

- **TRAINING TIP: *The 6 hour bail hold does not apply to juveniles.***

F. Arraignment:

Pursuant to G.L. c. 265, § 13M and § 15 D, only the Commonwealth can move for an expedited arraignment within 3 hours of the defendant's arrest on charges related to M.G.L. 265 §13M and §15 D. The clock starts ticking when the clerk signs and issues a complaint.

The court will also provide a form that will require both the prosecutor and judge to include information as to whether the defendant's charges involved abuse. Prior to release on bail, if the judge determines that the abuse alleged is domestic, the written findings shall be entered into a domestic violence record keeping system. This procedure shall be followed in all arraignments involving victim crimes. A domestic violence database can only be removed if there is an acquittal, no bill or a finding that there was no probable cause to issue the complaint.

G. Dangerousness Hearing (276, § 58A):

The new law expands the time frame that a defendant can be held after a dangerous hearing from 90 days to 120 days. The change with dangerous hearings applies to all types of cases not just domestic violence. Judges now can consider hearsay when presiding over a dangerousness hearing. A summons for a victim, witness or victim's family member to appear at a dangerousness hearing may be allowed if there is a "good faith" showing as to why the person's presence would be material and relevant to support a conclusion that there are conditions of release which will reasonably assure the safety of any other person or the community. Upon the conclusion of a dangerousness hearing, judges are required to make written findings and enter the information into the domestic violence database.

The court, defendant, or the prosecutor may reopen a dangerousness hearing upon a change of circumstances that has material bearing on whether there are conditions of release that will presumably assure the safety of any person or the community.

H. Disposition

No Accord and Satisfaction

The new law prohibits accord and satisfaction pursuant to G.L. c. 276, § 55, in all cases alleging violations of a restraining order or a criminal act constituting domestic abuse. The accord and satisfaction allows for the dismissal of charges based on an agreement worked out between the victim and defendant.

Additional Fees:

The court shall impose an additional domestic violence prevention and victim assistance assessment of $50 for: (i) any violations of 209A orders (ii) a conviction or adjudication for an act which would constitute abuse, as defined in section 1 of chapter 209A; or (iii) a violations M. G.L. c. 265, §13M or 15D which will be deposited in the Domestic and Sexual Violence Prevention and Victim Assistance Fund.

I. Training Requirements:

The law requires that all law enforcement officers shall receive during 8 hours of instruction related to procedures and techniques involving domestic cases as components of the recruit academy. The Municipal Police Training Committee shall, subject to appropriation, periodically include within its in-service training curriculum a course of instruction on handling domestic violence and sexual violence complaints.

Additionally, the chief justice of the trial court shall provide domestic violence and sexual violence training biannually to appropriate court personnel of the municipal, district, probate and family, juvenile and superior courts throughout the commonwealth, including but not limited to judges, clerks of court, probation officers, court officers, security officers and guardians.

J. Fatality Assessment Team:

The law creates a state domestic fatality review team which will be monitored by the Executive Office of Public Safety. The state review team shall consist of the following members: the secretary of public safety or a designee employed by the executive office of public safety and security who shall serve as chair; the attorney general or a designee employed by the office of the attorney general; the chief medical examiner or a designee employed by the office of the chief medical examiner; a member selected by the Massachusetts District Attorneys Association; the colonel of the state police or a designee employed by the department of state police; the commissioner of probation or a designee employed by the office of probation; the chief justice of the trial court or a designee; the chief justice of the family and probate court or a designee; and 1 member selected by the Massachusetts office of victim assistance, who shall be employed by the office. There will also be eleven local review teams in each district to be chaired by the District Attorney.

K. Employment

Pursuant to G.L. c. 149, § 52E allows employees to take up to 15 days leave within a 12 month period if the employee or family member is a victim of domestic or sexual violence, stalking or kidnapping. Leave for medical, psychological or legal assistance to housing or for legal matters is permissible under this law.

Key Factors related to the changes with employment:

- Employee cannot be perpetrator

- Employer can decide if the leave is paid or not
- Leave applies to employers who have more than 50 employees
- Employee may require documentation or procedures to be followed
- All information pertaining to the employee's leave must be kept confidential unless if falls under an exception
- This section defines abuse as "engaging or threatening to engage in sexual activity with a dependent child, engaging in mental abuse which includes threats, intimidation or acts designed to induce terror, depriving another of medical care, housing, food or other necessities of life or restraining the liberty of another." Abuse applies to parent, step parent, child, step child, grandparent, grandchild, sibling or persons involved in guardianships.

Commonwealth v. Dossantos, 472 Mass. 74, (2015): The SJC finds that § 56A requires that before a judge makes a "written ruling that abuse is alleged in connection with the charged offense," the judge must inquire into and be satisfied that there is an adequate factual basis for the allegations of abuse made by the Commonwealth. The SJC never addressed the due process issues raised by the defendant. The case was appealed for further clarification of whether G. L. c. 276, § 56A (§ 56A), a statute enacted in 2014 as one component of a comprehensive package of legislation entitled, "An Act relative to Domestic Violence" was lawful. See St. 2014, c. 260, § 30. § 56A requires that in every case in which a person is arrested and charged with a crime against the person or property, if the Commonwealth alleges that domestic abuse occurred "immediately prior to or in conjunction with" the charged crime, the Commonwealth is to file a written statement that details what abuse and the judge, also would be required to make a written ruling and then it would be entered into the Statewide domestic violence record keeping system (DVRS).

Although the preliminary written statement is to be maintained in the DVRS, but it is not considered a public record or criminal offender record information, and is not available for public inspection, it still is maintained by the commissioner of probation. Section 56A also provides that if the crime that triggered the Commonwealth's preliminary written statement of abuse is ultimately disposed of by (1) a finding of not guilty, (2) a "no bill" returned by the grand jury, or (3) a finding of no probable cause by the court, the preliminary written statement is to be removed from the DVRS. In the event of a dismissal of the charge, however, the statement of abuse is not "eligible for removal" from the DVRS. Id.

Parental Privilege

The SJC holds that under the parental privilege parents can use force to discipline their children as long as it is reasonable.

Commonwealth v. Dorvil, 472 Mass. 1 (2015): Detective Ernest S. Bell, (hereinafter referred to as "Detective Bell") of the Brockton Police Department and Lieutenant Mark Porcaro (hereinafter referred to as "Lt. Porcaro") arrived at the police department when they observed a commotion at the bus terminal across the street. Detective Bell observed Jean Dorvil, (hereinafter referred to as "Dorvil") yelling, "Shut up, shut up," at a young child and a woman while walking on the sidewalk. According to Detective Bell, Dorvil kicked the child, "kind of like a football kick," in the backside. Dorvil shouted, "Shut up," again before bending over and

"smacking the child on the buttocks." A woman bent down and picked up the child. Throughout the incident, Dorvil appeared "very upset" and "angry," and he was shouting so loudly that he could be heard at the police station, approximately thirty-five yards away. The child was crying and "looked frightened." Lt. Porcaro also witnessed the incident but thought that Dorvil kicked the child with a "slight hesitation to it, but he eventually came up and made contact with the girl." Lt. Porcaro testified at trial that he did not recall Dorvil hitting the child. The police questioned Dorvil about kicking and spanking the child. Dorvil told police that he was "disciplining his child." The child's mother agreed that Dorvil and the child were "horseplaying." Dorvil was arrested for assault and battery and threatening to commit a crime. According to Lt. Porcaro, Dorvil told him they should "box it out," while he was at the station.

Dorvil later testified that he told his daughter if she did not stop talking back, he would spank her. "Daddy will pow pow, if you don't stop." He then "tapped her" on "her butt" in an effort to make her "calm down." Dorvil stated that the child never fell down or began crying, either when they were playing or when he spanked her. He also denied ever telling his daughter to "shut up." The child's mother also relayed a similar set of events as Dorvil and she said the child was not crying and did not appear fearful when she picked up the child after the spanking.

Dorvil was convicted of assault and battery for spanking his minor child and threatening to commit a crime. Dorvil filed an appeal arguing that there was insufficient evidence to sustain a conviction of assault and battery because of the parental privilege to use force in disciplining a minor child. The Appeals Court issued an order pursuant to its rule 1:28, determined that the Dorvil's conduct fell outside of the parental privilege defense and affirmed the convictions. The SJC granted appellate review to clarify the scope of the parental privilege defense and reversed Dorvil's conviction. The SJC had to determine the parameters of the parental privilege defense on appeal.

Conclusion: The SJC had never directly addressed the parental privilege issue until this case.

The SJC concluded that any "parent or guardian may not be subjected to criminal liability for the use of force against a minor child under the care and supervision of the parent or guardian, provided that (1) the force used against the minor child is reasonable; (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and (3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress."

While the balance established with this parental privilege may not be perfect but "to the extent that that is so, the balance will tip in favor of the protection of children from abuse inflicted in the guise of discipline." Otherwise put, the parental privilege defense must strike a balance between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction.

Since there was no evidence that Dorvil's "smack" resulted in any injury to the child, or that Dorvil's use of force was unreasonable, the SJC reversed the convictions and found that the use of force reasonably related to a permissible parental purpose.

E.C.O. v. Compton*,** 464 Mass. 558 (2013): The SJC vacated the District Court's order because there was no evidence of abuse even though Compton and the daughter were in a "substantive dating relationship." ***ECO v. Compton is significant because it expanded what is considered a "substantive dating relationship," to include relationships that develop from various forms of technology and consist largely of electronic communications. Even if a relationship develops or progresses through electronic communications, a level of intimacy can exist and be sufficient to establish a "substantive dating relationship." For the purposes of Chapter 209A Orders "substantive dating relationship" includes relationships conducted electronically.

Threats on Social Media

The Supreme Court holds that posting threats on Facebook was not enough to uphold a conviction under the federal threat statute!

Elonis v. United States, United States Supreme Court, No. 13-983 (2105): The petitioner, Anthony D. Elonis, posted several violent messages on his social media account after his wife left him. Elonis claimed he was an artist who turned to rap lyrics for therapeutic purposes to help him cope with depression. "There¹s one way to love you but a thousand ways to kill you," he wrote in one post. "Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined," he wrote in another. Elonis was charged and convicted for violating a federal threat statute. Elonis appealed his conviction to the Supreme Court arguing that the government should have been required to prove he actually intended to make a threat before sending him to jail for a 44 month term. Instead, the jury was told the standard was whether a "reasonable person" would have understood the words to be a threat.

Conclusion: The Supreme Court held that it wasn't enough to convict the man based solely on the idea that a reasonable person would regard his communications as a threat. "Our holding makes clear that negligence is not sufficient to support a conviction," wrote Chief Justice. The Court held that the legal standard used to convict him was too low, but left open what the standard should be. It is a narrow ruling and the Court did not address the larger constitutional issue.

- **TRAINING TIP:** This ruling is significant because it provides some indication of where the courts are going when freedom of speech is at issue. Last month, the Massachusetts Supreme Judicial Court heard a case involving threats posted on social media. Although the facts are different, it will be interesting how the Massachusetts SJC rules in light of this recent decision from the Supreme Court.

Harassment Orders

Commonwealth v. Welch, 444 Mass. 80, 90 (2005): Criminal harassment orders require that the defendant target a specific person with three acts to qualify a criminal harassment under G. L. c. 265, § 43A(a).

DeMayo v. Quinn, 87 Mass. App.Ct.115, (2014): Although a civil harassment prevention order under G.L. c. 258E does not require a relationship between the parties, it does require the intentional acts be aimed at a specific person. The Appeals Court agreed and vacated a harassment prevention order that was issued against the defendant pursuant to G. L. c. 258E and extended for one year. The defendant appealed from the extension of the order, claiming that his conduct was neither "willful or malicious," nor "aimed at a specific person," as required by the statute.

Elements of Criminal Harassment, **G.L. c. 265, § 43A**:

a. Whoever willfully and maliciously
b. engages in a knowing pattern of conduct or series of acts over a period of time directed
c. at a specific person,
d. which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished by imprisonment in a house. ***Commonwealth v. McDonald***, 462 Mass. 236, 240 (2012).

Harassment involving Sexual Misconduct G.L. c. 258E, § 1 (ii):

a. An act the by force, threat or duress cause another to involuntarily engage in sexual relations

b. Constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 432A of c. 265 or section 3 of c. 272.

See ***O'Brien v. Borowski,*** 461 Mass.415 (2013)

Civil Harassment

F.A.P. v. J.E.S: 87 Mass. App. Ct., 595, (2015): An eleven year old boy raped a 7 year old girl. As a result of the incident, a juvenile judge issued a temporary harassment order against the eleven year old juvenile. The order was extended for a year and based on the allegations that the defendant digitally raped her. The juvenile appealed arguing that there was not enough evidence to prove harassment. The judge in the harassment proceeding determined that since the defendant did not instill fear to the victim, the harassment order could not issue. The issue was appealed to the Massachusetts Appeals Court who held that there was sufficient evidence of harassment to support the judge's order, but that the judge applied an incorrect view of the law.

The Appeals Court examined two definitions of harassment that would merit issuing a 258 (e) order. The first definition of G. L. c. 258E, § 3, does not apply to the facts of this case, but defines "harassment as three (3) or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to

property and that does in fact cause fear, intimidation, abuse or damage to property." G. L. c. 258E, § 1, inserted by St. 2010, c. 23 (definition of "harassment," subsection [i]). See generally ***Seney v. Morhy***, 467 Mass. 58, 63 (2014).

The second definition of "harassment" applies to what had occurred here and involves, a defendant allegedly committing one or more acts of sexual misconduct. G. L. c. 258E, § 1 (definition of "harassment," subsection [ii]). Under this definition, a harassment prevention order can issue in two different ways:

1. Harassment order can issue if the defendant "by force, threat or duress caused the plaintiff to involuntarily engage in sexual relations," or

2. Harassment order can issue if the defendant committed any of twelve specifically enumerated sex crimes, including — as relevant here — rape of a child, G. L. c. 265, § 22A. If the defendant digitally raped the plaintiff, this would constitute a violation of G. L. c. 265, § 22A, and would qualify as "harassment." It would be unnecessary to prove that the defendant intended to cause fear.

The Appeals Court also found that the judge erred because she determined that since there was no indication the defendant caused fear to the victim, a harassment order could not issue. However, pursuant to G. L. c. 265, § 22A, a harassment order can issue as long as there is an allegation of one the enumerated sex crimes that was included in the statute. In this case, the judge did not consider whether the defendant actually raped the victim and if that had been shown, a harassment order would have issued under the second definition. Based on the evidence, there was sufficient proof that a 7 year old girl suffered a labial tear directly after having been alone with a defendant who had previously engaged in an indecent touching of her. There was sufficient evidence to support a finding that the defendant raped the plaintiff.

Differences between 209A and 258 E Orders

	209 A Orders Restraining Orders	258 E Orders
Definition	**Suffering abuse:** ➢ Causing physical harm ➢ Or placing another in fear of imminent serious physical harm ➢ Or causing another to engage involuntarily in sexual relations by threat, force or duress **Includes Family or Household Members** ➢ Who are married or living together ➢ Related by blood or marriage ➢ Have a child together regardless of living arrangement ➢ Dating or engaged	**Harassment: 3 or More Acts** 1)Aimed a specific person 2)Was willful and malicious 3)Intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion; 4) Conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim; 5)Or one act that by force thereat or duress causes another to involuntarily engage in sexual relations 6)Or one act that constitutes one of crime of sexual assault, harassment and stalking
Jurisdiction	Family, Probate, District Courts, BMC and Superior Courts (except for dating relationships)	District Courts, Superior Court, BMC and Juvenile Court if both parties under 17 years old
Venue	Plaintiff's residence Plaintiff's former residence left to avoid abuse	Plaintiff's residence
Timeliness	No time constraints as when to file the order	No time constraints as when to file the order
Relief	No abuse the plaintiff No contact the plaintiff Vacate plaintiff's household, multiple family dwelling and workplace Pay restitution Temporary custody of minor child Surrender firearms, gun licenses and FID cards	Court can issue order that the (a) defendant refrain from abusing or harassing the plaintiff, (b) no contact with plaintiff, (c) remaining away from plaintiff's home or workplace and (d) pay restitution directly related to losses. **No Surrender of Firearms or FID Card**

Child Pornography

A. Posing a Child in a State of Nudity or Sexual Conduct

Mass. Gen. Laws c. 272, § 29A: Anyone who knowingly, *with lascivious intent*, encourages, causes, coerces, solicits, or entices a person under 18 years of age - male or female - to pose or be shown in a state of nudity (or semi-nudity) for the purpose of photographing them. Using your cell phone to encourage a person, including a friend who is under 18 to photograph themselves nude or photograph body parts considered sexual in nature is illegal.

B. Dissemination of Pictures of a Child in a State of Nudity or Sexual Conduct

Mass. Gen. Laws c. 272, § 29B: Anyone who *with lascivious intent*, knowingly sends out or disseminates pictures of a person under 18 (1) in a state of nudity (or semi-nudity) or (2) engaged in a sexual act. This statute extends to a 16 year old boy or girl who photographs themselves and sends the picture through email or via cell phone violates the law.

C. Possession of Child Pornography

Mass. Gen. Laws c. 272, § 29C: It is illegal for anyone to knowingly possess photographs (in any format), which depict a person under the age of 18 posed with a lewd exhibition of genitals, buttocks, breasts or engaged in an actual or simulated sexual acts. This includes photographs of another person's exposed genitals on your cell phone or computer.

D. Dissemination of Harmful Matter to Minors

Mass. Gen. Laws c. 272, § 28: It is illegal for anyone to knowingly send to any person under the age of 18 matter considered to be "harmful matter." "Harmful matter" includes things that are obscene or pornographic in nature. Thus when an 18 year old photographs his or her genitals, for example, and sends it to their 17 year old girlfriend or boyfriend, they are in violation of this statute.

Other potential consequences

Aside from going to jail, a conviction in criminal court for "sexting" may result in a person having to register with the Sex Offender Registration Board. Additionally, a conviction for a felony can lead to expulsion or suspension in school.

***Commonwealth v. Zubiel*,** 456 Mass. 27 (2010): The SJC held that pursuant to *Mass. Gen. Laws ch. 272, § 28,* where the electronically transmitted text comprised the defendant's internet conversations with someone whom he thought was a thirteen year old girl (actually, an undercover police officer) did not qualify as "matter" as defined in *Mass. Gen. Laws ch. 272, § 31*, and therefore was neither a visual representation nor handwritten or printed material.

Commonwealth v. Sullivan, 82 Mass. App. Ct. 293 (2012): The Court concluded that a naked picture of an adolescent girl did not qualify as lewd because nudity alone was not sufficient for a finding of lewdness based on the language of the statute. The court examined a number of factors including, focal point, setting, age of child, whether the child was clothed, the depiction of the child, and intent in evaluating what qualified as lewd under *Mass. Gen. Laws ch. 272, § 29C(vii).*

Commonwealth v. Ericson, 85 Mass. App. Ct. 326 (2014): The Court upheld the convictions and found that the delay in the execution of the warrant and failure to return the warrant within the 7 days was reasonable in light of the circumstances. Secondly, the police lawfully seized the images on the defendant's cell phone under the plain view doctrine while they were attempting to find an image of the defendant in his tank top.

Commonwealth v. Tarjick, 87 Mass App. Ct., 374 (2014): While executing a search warrant, police were justified in seizing three (3) memory cards from the defendant's digital cameras because they were related to the criminal activity that he police were executing the search warrant. Although the images were not specifically listed in the original search warrant the police executed, the Court found under the plain view doctrine the police were justified in seizing the memory cards.

- **TRAINING TIP:** ***Tarjick*** is a good review of the requirements of the plain view doctrine, which allows evidence to be seized without a warrant if the following requirements are satisfied.

  Requirements for the Plain View Doctrine:
  a. Police are lawfully in a position to view the object
  b. Police have lawful access to the object
  c. The evidence is plausibly related to the criminal activity that the police are already aware of. See ***Commonwealth v. Balicki***, 436 Mass. 1, 8, 762 N.E. 2d 290 (2002).

Although the original warrant did not specifically list memory cards, the police were aware that "data may be freely transferred from one device to another through memory cards." Because of this possibility, it was reasonable to conclude that the memory cards may contain some of the alleged recordings of the sexual abuse.

Open, gross, lewd and lascivious behavior

Commonwealth v. Maguire, 87 Mass. App. Ct.**,** 855 (2015): A MBTA detective observed the defendant rub his penis with his hand over the outside of his pant for about 30 seconds while sitting across from a college age female on the train. The MBTA detective followed the defendant who was leaning against a pillar at the strain station with his hands in front of him. There were about 25 people on the platform and three women were sitting on a bench about five feet away from the defendant. The MBTA detective moved to see what the defendant was doing and from his vantage point he saw the defendant, who was still facing the women with his penis exposed. The detective stated that he was "disgusted and concerned that the women on the bench were being victimized." The detective told the defendant stop and eventually he was apprehended and charged. The issue on appeal concerned whether there was sufficient evidence to establish open, gross, lewd and lascivious behavior.

Pursuant to G.L. c. 272, § 16**,** open, gross, lewd and lascivious behavior requires the following elements:

1. Exposed genitals, breasts or buttocks
2. Intentionally
3. Openly or with reckless disregard of public exposure
4. In a manger to produce shock or alarm
5. Thereby actually shocking or alarming one or more persons.

The Court compared this case to the facts of ***Commonwealth v Pereira,*** 82 Mass. App. Ct. 344 (2012), where it determined that an "observer suffered significant negative

emotions as a result of the exposure and the observer's actions could be regarded as shock or alarm. Here, the Court held there was sufficient evidence to prove the defendant had violated G. L. c. 272 § 16, and that he caused shock and alarm to the police officer who described that he was "disgusted and concerned that the women were being victimized," when he observed the defendant's behavior.

- **TRAINING TIP**: The dissent argued that defendant's actions qualified as **Indecent Exposure** under G.L. c. 272 § 53**,** a violation of which occurs when there is "an intentional act of lewd exposure offensive to more than one person."

Commonwealth v. Coppinger, 86 Mass. App. Ct. 234, (2014): The Court held that M.G.L. c. 272, § 16, is not unconstitutionally vague and that the defendant exposed himself even though he was wearing a "see-through" covering and was not naked. The Court found that if a person's genitals, buttocks, or female breasts are clearly visible to the public than it is reasonable to conclude that a person exposed himself or herself. In its analysis, the Court compared the defendant's shorts to wearing cellophane. One witness described seeing the outline of the defendant's "semi-erect" penis, displaying something such that it was clearly visible, even though the defendant was wearing shorts. The observations of the witness taken in conjunction with the defendant's conduct qualified as "exposure," and exceeded the reasonable bounds of permissible expression, and as a result there was sufficient evidence to prove that the defendant exposed himself pursuant to G.L. c. 272, § 16.

Human Trafficking

Commonwealth v. McGhee, 472 Mass. 405 (2015): On November 21, 2011, An Act Relative to the Commercial Exploitation of People was enacted. The Act became effective on February 19, 2012, and it criminalized sexual servitude, forced labor and organ trafficking. The defendants in this case, Tyshaun McGhee and Sidney McGee, were indicted nine counts of aggravated rape, G.L. c. 265, § 22(a), three counts of trafficking persons for sexual servitude, G.L. c. 265, § 50, and two counts of deriving support from the earnings of a prostitute, G.L. c. 272, § 7. The charges arose from allegations by three women (C.C., S.E., and B.G.) that the defendants approached them, took their photographs to post as advertisements on a Web site called Backpage.com, drove them to various locations to have sex with men who responded to the advertisements, and then retained some or all of the money that the women received as payment from these men.

After being indicted, the defendants filed a motion to dismiss arguing that the statute for sex trafficking, G.L. c. 265, § 50, is unconstitutionally vague and overbroad, both on its face and as applied to them. The motion was denied and the defendants were convicted on the charges. A judge of the Superior Court denied the motion and trial, Tyshaun McGhee was convicted for trafficking persons for sexual servitude (C.C., S.E., and B.G.), and on deriving support from the earnings of a prostitute (C.C. and S.E.). Sidney McGhee was convicted trafficking persons for sexual servitude (C.C., S.E., and B.G.). Both defendants filed appeals and the SJC heard the case on direct appellate review.

Conclusion: The SJC held that G.L. c. 265, § 50(a), is constitutional and is sufficiently clear and definite. Although G.L. c. 265, § 50(a), does not include the element of force or coercion, the statute is still constitutional and not vague. Specifically, G.L. c. 265, § 50(a), states "the

knowing commission of specified acts for the purpose of enabling or causing another person to engage in commercial sexual activity."

The statute clearly provides comprehensible standards for law enforcement that discourage arbitrary arrests and prosecutions. On appeal the defendants argue that 'merely assisting' an adult consenting prostitute does not qualify as commercial exploitation. The SJC did not agree especially when all the elements have been satisfied. Here, the defendants' actions clearly qualified as sex trafficking as defined by G.L.c. 265, §50(a).

Second, the SJC held that G.L.c. 265, §50(a), was not overbroad and that it specifically does not prohibit all interactions or associations between a prostitute and family members, friends, or social service organizations. Rather, it forbids such individuals or entities from knowingly undertaking specified activities that will enable or cause another person to engage in commercial sexual activity. Conduct involving commercial sexual activity is not protected.

Finally, the defendants argue that the phrase 'commercial sexual activity' as used in G.L. c. 265, § 50(a), and as defined by G.L. c. 265, § 49, is overbroad because the phrase can encompass many noncriminal sexually oriented activities where money exchanges hands, including 'telephone sex' services, nude dancing, online 'chat' session, and adult pay-per-view television shows. Because the phrase is so expansive, the defendants argued it should be deemed unconstitutional. The SJC did not agree with this argument and found that G.L. c. 265, § 50(a), was enacted to prohibit the trafficking of persons for sexual servitude, not to prohibit all range of sexually oriented activities and expressions. Due to this distinction, the SJC concluded that the term "commercial sexual activity" refers to any <u>sexual act for value that involves physical contact.</u>

- **TRAINING TIP:** The language of the sex trafficking statute G.L. c. 265, § 50(a), is clear and well defined.

IV. Juvenile Issues

<u>An Act Increasing Juvenile Age</u>

Effective immediately, on September 18, 2013, **H 1432, *"An Act Expanding Juvenile Jurisdiction,"*** became law. The new legislation increases the age of juvenile offenders from between the ages of 7 and 17 to between the ages of 7 and 18, as well as for youthful offenders from between the ages of 14 and 17 to between the ages of 14 and 18.

The new legislation impacts where police file complaints, what court a juvenile is arraigned in, how a juvenile is sentenced and where a juvenile is locked up. Additionally, police could previously interrogate a 17 year old without a parent or guardian. Recent case law has established that the legislation is not retroactive. The key date is September 18, 2013.

Commonwealth v. Watts, 468 Mass 4 (2014): The SJC concluded that the Act Increasing Juvenile Age is <u>not retroactive</u> to criminal cases that were pending or began prior to

September 18, 2013, against persons who were seventeen years of age at the time of the alleged offense. Retroactivity only applies to persons who were seventeen years of age when they committed an offense and against whom criminal proceedings had begun and were pending on September 18, 2013, the effective date of the act.

Transfer Hearings (72 A):

Commonwealth v. Mogelinski, 466 Mass. 627 (2103): After "An Act expanding juvenile jurisdiction," was signed into law by Governor Patrick, the SJC was asked to clarify how the new law would impact the transfer hearings pursuant to M. G.L. c. 119, § 72A and how the new law would impact youthful offender indictments.

Conclusion: Pursuant to M. G. L. c. 119, § 72 and G.L. c. 119, § 72A, an individual's age at the time the individual is apprehended indicates whether Juvenile Court has jurisdiction to proceed. Here the SJC defined the word *apprehended,* under M.G.L. c. 119, § 72A, as the time when a summons is issued or when the juvenile is available for arraignment in Court. If the juvenile is not available and a warrant is issued, the Court defined that apprehension occurs when a juvenile is taken into custody and available to the Juvenile Court for disposition of the case.

The second issue the SJC considered was whether the act expanding juvenile age impacted the holding from the ***Nanny*** case. In ***Commonwealth v. Nanny,*** 462 Mass. 798 (2012), the Court held that the Commonwealth cannot proceed directly to a youthful offender indictment against an individual over the age of eighteen for crimes committed when the individual was fourteen to seventeen years of age. Rather, the Commonwealth must file a delinquency complaint in juvenile court and then seek a transfer hearing pursuant to M.G.L. c. 119, § 72A. **Id.** at 806.

Commonwealth v. Mercier, 87 Mass. App. Ct. 809 (2015): The sixteen year old defendant was indicted as a youthful offender for raping his younger cousin in 2008. Although the defendant was indicted, a juvenile complaint was never sought or issued prior to the indictment and the defendant was not apprehended until two (2) years after the incident. At that time, a juvenile judge dismissed the youthful offender indictment and ordered the case to be transferred in the District Court. The defendant was charged and convicted in Superior Court. The defendant appealed his convictions and argued that the Juvenile Court lacked the authority to hold a transfer hearing since a juvenile complaint was never initially filed. Pursuant to G.L. c. 119, § 72A, the Commonwealth needed to initiate a juvenile complaint prior to indicting the defendant as a youthful offender. If this procedure had been followed, the Juvenile Court would have had the authority to transfer the case to adult court. See ***Commonwealth v. Mogelinski***, 466 Mass. 627 (2013): 'Ultimately, the Juvenile Court is a court of limited jurisdiction, which "has no … authority in the absence of a specific statutory authorization."' … Here, without the prior issuance of a juvenile complaint, the Juvenile Court lacked the authority to proceed on a direct indictment of the defendant as a YO and to transfer the defendant's case to adult court." The Appeals Court vacated the convictions.

- **TRAINING TIP:** ***Mercier*** reinforces that a juvenile <u>complaint must be taken out before a juvenile can be indicted as a youthful offender</u>. If the juvenile is

apprehended when the juvenile is an adult, the case must first be brought to juvenile court before it can be transferred to adult court through at 72A hearing. The District Attorney's office would assist in determining the appropriate place to file a complaint for a juvenile that was apprehended when the juvenile was an adult.

AGE CHART

	Current Law
Age of Delinquent Children	Ages 7-under Age 18
Age of Youthful Offenders (any juvenile tried as an adult for certain offenses specified in the statute.)	Ages 14- 17
Juvenile Arraignment	Anyone under the age 18 is now arraigned in Juvenile Court.
72 (a) Transfer Hearings	If a juvenile commits an offense prior to turning age 18 but is not apprehended until or before the juvenile turns 19, Juvenile Court would handle the matter as a as if the juvenile had not reached age 18 or in as a delinquency.
Lock up juveniles	Anyone under age 18 must be brought to a juvenile facility and not an adult prison.
Miranda	Police cannot interrogate a person under the age of 18 without an interested adult or parent present.
Protective Custody if Child Found in Presence of Controlled Substance	Police can now lawfully take any child under the age of 18 into protective custody if the child is found in the presence of drugs. A child shall not be kept in protective custody for longer than four hours and police shall make an effort to notify the child's parents or guardian.
Junior Operator's license	• No JOL Issued Before 16 ½ (includes passenger restriction and time restrictions) • Parent Must Accompany JOL Holder between 12:30 a.m. and 5 a.m. • If licensed out of state and under age 16 ½ cannot get a JOL • Massachusetts JOL not applicable to non-residents

Driving Offenses	• Can lose JOL for alcohol/drug related violations even if not operating a motor vehicle • Can Lose JOL for Use of False License/ID to Obtain Alcohol • Enhanced Penalty" for JOL Violation Applies Even if Holder Not Convicted Until After Turning 18 • JOL Suspensions Extend Beyond Age 18 • Junior Operators Not Allowed to Use Cell Phones While Driving
CORI Implications	Juvenile Records are not public when a juvenile reaches age 18.
Disposition/Adjudication of Cases	**CWOF:** • If juvenile resolves case with continuation without a finding, then can be on probation until child reaches age 18. • If the juvenile disposes of case after turning 18 could be on probation until 19 and if disposes of case after 19th birthday could be on probation until age 20 **Delinquency:** • Can be on probation until 18 unless disposes of case after 18 could be on probation until 19. **Youthful Offender** Only change here is that a youthful offender who is not 18 when sentenced to state prison or house of correction must be kept in a separate facility from adult prisoners.
Diversion	Diversion can be offered to any juvenile who has reached the age of eighteen years but has not reached the age of twenty-two and has no prior convictions.

Overview of Child Requiring Assistance[6]

I. Summary of the New Changes to Mass. Gen. Laws, M.G.L. c. 119, §§ 39E-L.

On November 5, 2012, a new law known as FACES, "Families and Children Engaged in Services" passed and replaced what was formerly known as Child in Need of Services (hereinafter referred to as "CHINS.") Many of the key changes were included in last year's instructor guide. Commencing in November 2014, many of the procedural aspects of CRA reform were rolled out. Below is a quick review of CRA highlights followed by the new programs that became active.

[6] The majority of the information contained in this section was provided in a document by the Trial Court of Massachusetts, Administrative Office of the Juvenile Court, entitled "Child Requiring Assistance" dated October 25, 2012 and from *Mass. Gen. Laws. Ch. 119, §§ 39E-L.*

A. Age

The new law allows applications for assistance to be filed on a child between the ages of six (6) and eighteen (18). Cases must be dismissed on the child's eighteenth (18th) birthday with the exception of young adults in the Department of Children and Families (DCF) care requiring permanency hearings.

B. Status Offenses

CRA did not alter the status offenses that existed under the CHINS program. The five (5) status offenses are "*truant*," "*habitually truant*," "*stubborn*," "*runaway"* and "*sexually exploited child*."

C. Parent, Guardian, or Custodian of Child[7]

A parent, legal guardian, or custodian of a child having custody of such child, may initiate an application for assistance if said child is a *"Runaway,"* meaning the child repeatedly runs away from home, or is a *"Stubborn Child,"* meaning the child refuses to obey the lawful and reasonable commands of said parent or guardian resulting in the parent or guardian's inability to adequately care for and protect said child. Police officers cannot initiate an application for assistance if child is "*habitually truant*," "*habitual school offender*," "*stubborn*" or a "*runaway."* See attached page #143, Parent/Legal Guardian/Custodian Application Form.

D. Sexually Exploited Child

A parent, legal guardian, or custodian of a child having custody of such child, and a police officer, may file an application for assistance for a sexually exploited child, as defined by Mass. Gen. Laws ch. 119, § 21. *The application must also state whether the child is a "runaway" or "stubborn child."* The filing of an application for assistance may result in the prostitution charge being placed on file. See attached page #144, Parent/Legal Guardian/Custodian/Law Enforcement Application for Sexually Exploited Child Form.

Any person, before or after an arraignment, in a delinquency or criminal proceeding for a violation of Mass. Gen. Laws ch. 272, § 53 or Mass. Gen. Laws ch. 272, § 53A(a) may file a care and protection petition on behalf of a sexually exploited child, including an emergency commitment under Mass. Gen Laws ch. 119, § 24.

E. School District

A representative from a school district may initiate an application for assistance if said child is *"Habitually Truant,"* meaning the student has failed to attend school for more than eight (8) school days in a quarter, or the said student is a *"Habitual School Offender,"* meaning the student fails to obey the lawful and reasonable regulations of the child's school. All school-based offenses must be dismissed on the child's sixteenth (16th) birthday.

[7] DCF may file an application for assistance for a child who is a runaway or a stubborn child and is in their custody.

When a truancy application is filed, *the application must state whether or not the child and the child's family have participated in the truancy prevention program[8], if one is available, and provide a statement of the specific steps taken under the truancy prevention program to prevent the child's truancy.* When a *habitual school offender* application is filed, the application must state that the child has repeatedly failed to obey the lawful and reasonable regulations of the school as well as a statement of the specific steps taken by the school to improve the child's conduct.

The new law allows "a representative from the school district" to file the application which may or may not be a truant officer. See attached page #145, School District Application Form.

F. Right to Counsel

The new law requires that children be notified of their right to counsel upon the filing of an application and have counsel present at all subsequent hearings. The law also provides that parents have the right to counsel at any hearing *"regarding custody of the child."*

G. Clerk & Court

(i) ***Filing the Application*:** Upon filing an application, the Clerk is required to provide information in writing to let the petitioner know the possible ramifications of an application to the court and schedule a preliminary hearing *within 15 days* of the application being filed.

(ii) ***Preliminary Hearing*:** Probation will make the recommendation to either; (a) dismiss the application for lack of probable cause, (b) refer the child and parent for Informal Assistance, or (c) schedule a fact-finding hearing.

(iii) ***Informal Assistance***: The Informal Assistance period has been shortened to ninety (90) days, which may be may be extended for an additional ninety (90) days. The maximum period of Informal Assistance is one hundred and eighty (180) days.

(iv) ***Bail*:** The new law eliminates bail, but allows the court to release the child on conditions or grant temporary custody to DCF for no longer than 45 days.

(v) ***Trial*:** The new law eliminates the de novo process and the right to a jury trial. The "fact-finding hearing" is a bench trial with the same "beyond a reasonable doubt" standard for adjudication.

H. Disposition

(i) ***Motion to Dismiss the Application*:** At any time prior to the Disposition Hearing, the petitioner or any other party may file a motion to dismiss the application for assistance.

(ii) ***Disposition Hearing*:** After the case has been adjudicated, the court is required to convene a conference in order to discuss and determine the appropriate treatment, services, placement and conditions for the child, with written recommendations from the probation officer. The Disposition Hearing will not take place until this conference has been completed.

(iii) ***Disposition Order*:** The first disposition order will last no longer than 120 days. At the end of the Disposition Review Hearing, the case may be extended for 90 days if the purpose of the order has not been accomplished. The judge may extend the order three (3) additional times, however *the case must be dismissed within 390 days.* If an officer possesses a Warrant of Protective Custody and encounters a child after court hours, the child may be taken into custodial protection pursuant to provisions G.L. 119 § 39 H as described in Section I.

Note: All cases must be dismissed on the child's eighteenth (18th) birthday with the exception of young adults in DCF care requiring permanency hearings.

I. Protective Custody Warrant

A judge may order a Warrant of Protective Custody after the child fails to respond to a summons issued for the preliminary hearing or in the case of an emergency. The warrant is similar to a Warrant of Apprehension and is to be served in the same manner. Therefore the child must be delivered to the court before 4:30pm. After 4:30pm, the warrant expires.

When an officer takes a child into custody upon the execution of a Warrant of Protective Custody, the officer shall immediately bring the child to the Clerk's Office and shall file the return of service. Police officers cannot use handcuffs when taking a child into "custodial protection."

J. Child Taken into "Custodial Protection" by Police

In accordance with *Mass. Gen. Laws, ch. 119, § 39H*, a child may be taken into custodial protection for engaging in the behavior described in the definition of "child requiring assistance" *only if,*

(1) the child has failed to obey a summons, or

(2) the law enforcement officer initiating such custodial protection has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

After a law enforcement officer has taken a child into "custodial protection," the officer shall immediately notify the child's parent, guardian, or other person legally responsible for the child's care. Notification must be made to DCF if the officer has reason to believe that the child is or has been in the care or custody of DCF.

The law enforcement officer, *in consultation with the probation officer*, shall then immediately make all reasonable diversion efforts so that such child is delivered to the following types of placements, and *in the following order of preference:*

(i) To one of the child's parents, or to the child's guardian or other responsible person known to the child, or to the child's legal custodian including the department of children and families or the child's foster home *upon the written promise, without surety*, of the person to whose custody the child is released that such parent, guardian, person or custodian will bring the child to the court on the next court date; or

(ii) Forthwith and with all reasonable speed take the child directly and *without first being taken to the police station house,* to a temporary shelter facility licensed or approved by the department of early education and care, a shelter home approved by a temporary shelter facility licensed or approved by said department of early education and care or a family foster care home approved by a placement agency licensed or approved by said department of early education and care; or

(iii) Take the child directly to the juvenile court in which the act providing the reason to take the child into custodial protection occurred *if the officer affirms on the record* that the officer attempted to exercise the options identified in clauses (i) and (ii), was unable to exercise these options and the reasons for such inability. See attached page #146, Police Officer/Law Enforcement Affirmation Form.

COUNTY[IES] DIVISION	TRIAL COURT OF MASSACHUSETTS JUVENILE COURT DEPARTMENT	DOCKET NO.

PARENT/LEGAL GUARDIAN/CUSTODIAN APPLICATION FOR CHILD REQUIRING ASSISTANCE

Child's Name: _____ D.O.B. _____

The applicant is the child's:

☐ mother ☐ father ☐ legal guardian ☐ custodian with custody of the child

The applicant alleges that the above named child and the child's family require assistance as defined in G.L. c. 119, § 21, in that said child who is between the ages of six and eighteen:

☐ repeatedly runs away from the home of a parent, legal guardian or custodian

OR

☐ repeatedly fails to obey lawful and reasonable commands of a parent, legal guardian, or custodian, thereby interfering with the parent's, legal guardian's or custodian's ability to adequately care for and protect said child

_____
Date

_____
Signature of Applicant

_____
Print Name and Title

_____
Address

_____

_____
Telephone Number

JV-086 (11/05/2012)

COUNTY[IES] DIVISION	TRIAL COURT OF MASSACHUSETTS JUVENILE COURT DEPARTMENT	DOCKET NO.

PARENT/LEGAL GUARDIAN/CUSTODIAN/LAW ENFORCEMENT APPLICATION FOR CHILD REQUIRING ASSISTANCE FOR SEXUALLY EXPLOITED CHILD

Child's Name: _____ D.O.B. _____

The applicant is:

☐ child's mother ☐ child's father ☐ child's legal guardian

☐ custodian with custody of the child ☐ law enforcement/police officer

The applicant alleges that the above named child and the child's family require assistance as defined in G.L. c. 119, § 21, in that said child who is between the ages of six and eighteen is a sexually exploited child as defined in G.L. c. 119, § 21, and:

☐ repeatedly runs away from the home of a parent, legal guardian or custodian

OR

☐ repeatedly fails to obey lawful and reasonable commands of a parent, legal guardian, or custodian, thereby interfering with the parent's, legal guardian's or custodian's ability to adequately care for and protect said child

_____
Date

_____
Signature of Applicant

_____
Print Name and Title

_____
Address

_____

_____
Telephone Number

JV-087 (11/05/2012)

COUNTY[IES] DIVISION	TRIAL COURT OF MASSACHUSETTS JUVENILE COURT DEPARTMENT	DOCKET NO.

SCHOOL DISTRICT
APPLICATION FOR CHILD REQUIRING ASSISTANCE

Child's Name: _____ D.O.B. _____

School: _____ Current Grade _____

The applicant alleges that the above named child and the child's family require assistance as defined in G.L. c. 119, § 21, in that said child who is between the ages of six and eighteen:

☐ is habitually truant.

The child and the child's family ☐ have ☐ have not participated in a truancy prevention program. A truancy prevention program ☐ is ☐ is not avilable at this time. *If a program was available and the child and family did not participate, state the reason for their non-participation.*

_____

_____

_____

If the child and and family participated in a program, state specific steps taken under the program to prevent the child's truancy.

_____

_____

_____

☐ Separate sheet attached.

☐ repeatedly fails to obey lawful and reasonable regulations of the child's school.

The following specific steps were taken to address the child's conduct: (*attach sheet if needed)*

_____

_____

_____

_____
Date

_____
Signature

_____
Print Name and Title

_____
Address

_____

_____
Telephone Number _____

JV-088 (11/05/2012)

COUNTY[IES] DIVISION	TRIAL COURT OF MASSACHUSETTS JUVENILE COURT DEPARTMENT	DOCKET NO.

Application for Child Requiring Assistance

In Re: _____

POLICE OFFICER/LAW ENFORCEMENT AFFIRMATION

I swear and affirm under the pains and penalties of perjury that I was unable to deliver the child to:

1. one of the child's parents, or to the child's guardian or other responsible person known to the child, or the child's legal custodian including the Department of Children and Families or the child's foster home upon written promise, without surety, of the person to whose custody the child is released that such parent, guardian, person or custodian will bring the child to the court on the next date;

2. a temporary shelter licensed or approved by the Department of Early Education and Care, a shelter home approved by a temporary shelter facility licensed or approved by said department of early education and care or a family foster care home approved by a placement agency licensed or approved by said department of early education and care;

for the following reason(s): _____

_____

_____

_____

_____

_____

_____

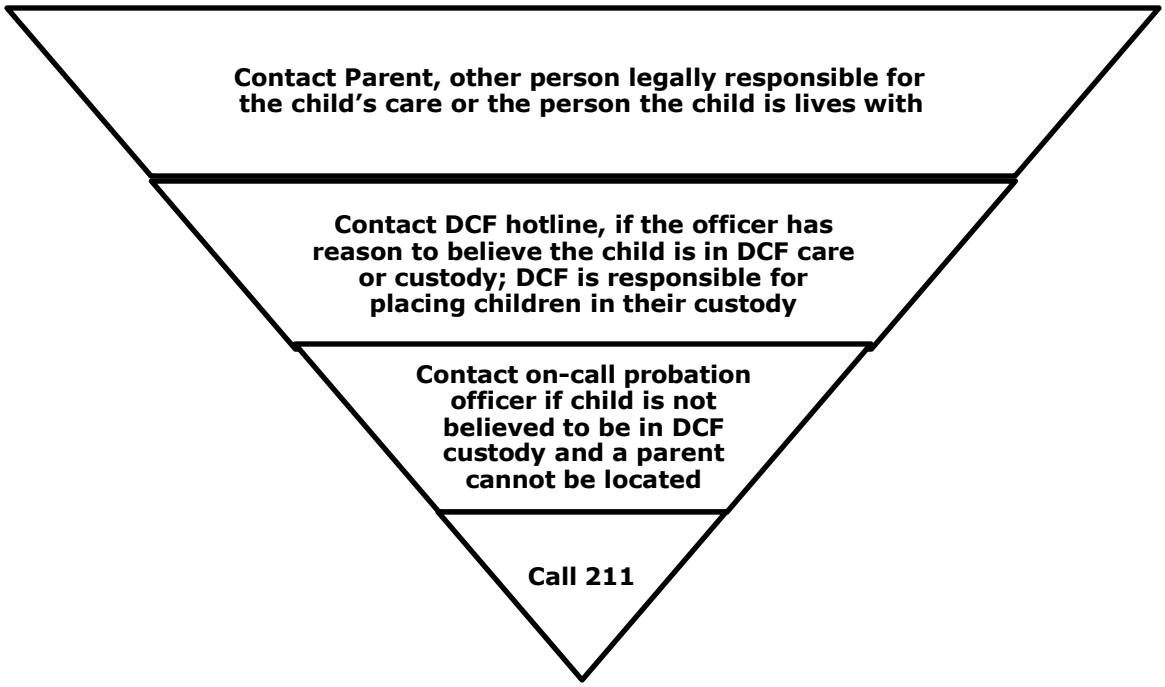
_____
Date

_____
Signature

_____
Print Name

_____
Title

JV-094 (11/05/2012)



Runaway Assistance Program (RAP)

Following consultation with a probation officer, the police officer may contact the Runaway Assistance Program (RAP) for assistance in placing a runaway. RAP is a new program to assist police officers who are dealing with runaways during the hours that juvenile court is closed, (evenings, weekends and holidays). RAP provides a safe place where police can bring a runaway child, age 17 and under. Police can access the RAP program by contacting Mass211, a statewide 24/7 information and referral program. Mass211 is accessed by dialing "2-1-1" on any phone. Mass211 acts as the "dispatcher" for the Runaway Assistance Program.

If appropriate, Mass211 will refer the officer to the closest Emergency Service Program (ESP). ESPs are funded by the Executive Office of Health and Human Services (EOHHS), the Department of Mental Health, and Massachusetts Behavioral Health Partnership. Twenty one (21) ESP locations are involved with the Runaway Assistance Program; Mass211 maintains an updated list of ESPs that are participating in the program. Once a police officer has delivered the child safely to an ESP, the officer is free to leave.

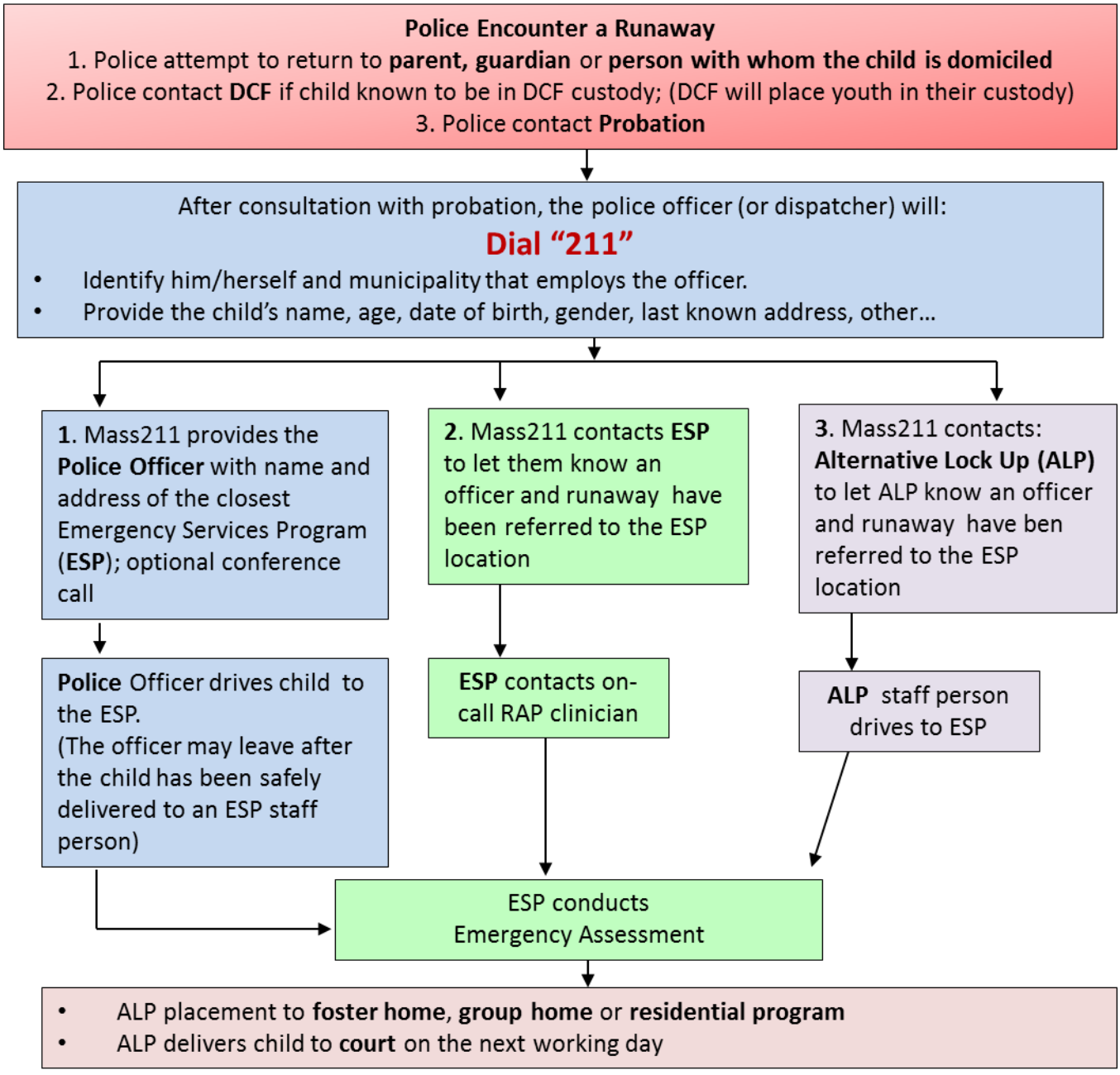
The ESP will then conduct an assessment of the child. Once the assessment is completed, the child may be hospitalized, or referred to a Non-secure Alternative to Lock-up Program (ALPs). Non-secure ALPs are funded by the Department of Children and Families. ALPs will provide a placement, (foster home or group home), for a runaway child during the hours that juvenile court is closed, (evenings weekends and holidays). ALPs will transport a runaway child to court on the next working day that court is open. Four ALP providers cover all geographic regions of the state. Mass211 maintains an updated list of ALPs that are participating in the program.

Note: At any time, any child who is taken into custodial protection by a police officer shall, if necessary, be taken to a medical facility for treatment or observation

Runaway Assistance Program Pilot

Flow Chart

(revised August 12, 2015)



Family Resource Centers

Effective **November 5, 2015:** The Secretary of EOHHS shall **establish a statewide network** of child and family service programs and family resource centers (FRCs). FRCs provide community-based, multi-cultural programs, including: evidence based parenting classes, youth and parent support groups, grandparent support groups, information and referral services, early childhood services, assessment services, and education programs for families and parents needing support. Any family member with any issue may receive a referral or direct assistance through the family resource centers. The family resource centers are divided into two categories: full sites and micro sites. As of August 2015, all the sites are open.

Full Sites: New Bedford Pittsfield, Quincy, Springfield, Worcester, Amherst, Boston, Brockton, Greenfield, Lawrence, Lowell and Barnstable.

Micro Sites: Fall River, Fitchburg, North Adams, Fitchburg, Oak Bluffs and Nantucket.

For contact information related to FRCs, please see www.frcma.org.

V. MISCELLANEOUS STATUES

Retail Theft Laws

Chapter 451 of the Acts of 2014: An Act to Improve Criminal Laws Relative to Organized Retail Theft has new crimes, expanded venue and definition of receipt of stolen property!

"An Act to Improve Criminal Laws Relative to Retail Theft," was signed by Governor Charlie Baker on January 8, 2015 and became effective on April 7, 2015. The key aspects of the bill are listed below.

Summary of Law:

The act addresses venue in all G.L. c.266 crimes, modifies G.L. c.266, § 60, and criminalizes the receipt of stolen property.

A. **Venue:** The Act allows crimes committed in different counties or District Courts to be joined together in order to be prosecuted together in the same court. The Commonwealth can charge the crimes in any court where at least one of the offenses occurred.

B. **Receipt of Stolen Property:** The Act modifies G.L. c. 266, § 60 and expands what is considered receipt of stolen property to include property obtained by law enforcement.

According to the modification, "whoever buys, receives or aids in the concealment of stolen or embezzled property knowing that the property was stolen or embezzled or whoever with intent to defraud buys, receives or aids in the concealment of property

knowing it to have been obtained by false pretense of carrying on a business in the ordinary course of trade, or whoever, intending to deprive the property's rightful owner permanently of the use and enjoyment of the property, obtains or exerts control over property

(i) that is in the custody of either any law enforcement agency or any individual acting on behalf of a law enforcement agency, and

(ii) that any law enforcement officer or any individual acting on behalf of a law enforcement agency explicitly represented to such person that the property is stolen.

These additions to the section essentially bar the defense that the fact that property was ***not stolen is not a defense.*** Also the fines have been increased to the following:

Penalty:

(i) Property $250 or less (1st offense) = increases fine to $1000
(ii) Property $250 or less (2nd offense) or for (1st offense) for property worth more than $250 = increases fine to $5000

C. **New Crimes M.G.L. c. 266, § 30B(a-e)**

1. ***Distribution or Possession of a Theft Detection Shielding Device:***
G.L. c. 266, § 30B(a): Anyone who knowingly manufactures, sells or offers for sale or distributes a laminated or coated bag or other device intended to shield merchandise from detection by an electronic or magnetic theft detector.

Penalty: HOC for up to 2 and ½ years or up to 5 years in state prison and/or a fine of up to $25,000.

2. ***Possession, Distribution or Use of a Theft Detection Shielding Device with intent to steal*****:** G.L. c. 266, § 30B(b): Anyone who knowingly possesses a laminated coated bag or device intended to shield merchandise from detection by an electronic or magnetic theft detector.
Penalty: up to 2 and ½ years in HOC or 5 years in state prison or a fine not to exceed $25,000 or both.

3. ***Possession of a Theft Detection Device Deactivator or Remover with Intent to Use it Without Permission of the Store***: G.L. c. 266, § 30B(c): Anyone who knowingly possesses any tool or device adapted to (i) allow the ***deactivation*** of a theft detection device with intent to use such a tool or device to deactivate or remove a theft detection device on merchandise without permission of the merchant or person owning or lawfully holding the merchandise or (ii) allows the ***removal*** of a theft detection device from merchandise with intent to use such a tool or device to deactivate or remove a theft detection device on merchandise without permission of the merchant or person owning or lawfully holding the merchandise.

Penalty: HOC for up to 2 and ½ years or up to 5 years in state prison and/or a fine of up to $25,000.

4. ***Distribution of a Theft Detection Device Deactivator or Remover:***
G.L. c. 266, § 30B(d): Anyone who knowingly manufactures, sells or offers for sale or distributes a tool or device designed or adapted to allow deactivation or removal of a theft detection device without permission.

Penalty***:*** HOC for up to 2 and ½ years or up to 5 years in state prison and/or a fine of up to $25,000.

5. ***Deactivation or Removal of a Theft Detection Device with Intent to Steal*:**
G.L. c. 266, § 30B(e): Anyone who intentionally deactivates or removes a theft detection device from merchandise prior to purchase in a retail establishment.

Penalty: HOC for up to 2 and ½ years or up to 5 years in state prison and/or a fine of up to $25,000.

6. ***Organized Retail Crime:*** G.L. c. 266, § 30D(b): Anyone who acts with at least ***two*** or more persons within a 180 day period to steal, embezzle or obtain by fraud or other illegal means retail merchandise valued at more than $2500 with intent to resell the stolen items.

Penalty: up to10 years in state prison
NOTE: a series of thefts can be joined and prosecuted in any county

7. ***Aggravated Organized Retail Crime:*** G.L. c. 266, § 30D(c): Anyone who commits an aggravated organized retail crime if that person is acting with two or more persons within a 180 day period to steal, embezzle or obtain by fraud or other illegal means retail merchandise valued at more than $10,000 with intent to resell the stolen items.

Penalty: up to15 years in state prison
NOTE: a series of thefts can be joined and prosecuted in any county

8. ***Leader of Organized Retail Crime:*** G.L. c. 266, § 30D(d): Anyone who shall be the leader of an organized retail theft enterprise if that person conspires with others as an organizer, supervisor, financier or manager to commit an organized retail crime or an aggravated retail crime.

Penalty: up to 20 years in state prison or a fine of not more than $250,000 or 5 times the retail value of the merchandise at the time of the arrest, whichever is greater or both.

9. ***Forging a Retail Receipt, Price Ticket or UPC Label with Intent to Defraud a Retailer*****:** G.L. c. 266, § 30C

Penalty: up to 2 and ½ years in HOC or up to 5 years in state prison or a fine not to exceed $10,000 or both.

D. Civil Recovery for claims involving shoplifting, larceny or attempted larceny:

The new Act modifies G.L. c. 231, § 85 ½: Under the Act, merchants can recover actual damages to goods for sale or personal property of a employees or consumers that occur during a shoplifting, larceny or attempted larceny.

(i) Property less than $50 = could recover up to $50 in damages
(ii) Property worth more than $50 but less than $250 = could recover up to $ 250 in damages
(iii) Property worth more than $250 = could recover up to $500

In order for a store to recover money in damages, the Act requires that the store "detail all of the pertinent information on which the merchant bases its claims."

NOTE: If the store solicits more money than permitted by law, the store could be fined $500.

Warrant Management System

Verify Warrant is Active in WMS before making the arrest!

Commonwealth v. Maingrette, 86 Mass. App. Ct., 691 (2015): The Appeals Court allowed the defendant's motion to suppress evidence seized from his motor vehicle trunk because the arrest warrant had been recalled. Members of the Boston Police gang unit failed to check the warrant management system prior to arresting the defendant outside of his apartment. Boston Police arrested the defendant because he had an active warrant. Although the police had checked the system four (4) hours prior to arresting the defendant, they did not confirm that the warrant was active when they eventually arrested him at the end of day. The Commonwealth argued that the delay was reasonable and not a violation under Article 14.

The Appeals Court did not agree because the evidence showed that at various intervals during the afternoon there were up to nine police officers working together to locate and arrest the defendant. The assignment did not include responding to an ongoing crime in which the defendant was engaged, but rather consisted primarily of surveillance intended to locate him. Each officer in the team had access to a computer that could be used to instantly access the warrant management system. Additionally two (2) detectives were assigned to watching the defendant's residence. Given these facts, it is difficult to conclude that the police had neither the time nor the opportunity to check the warrant management system to confirm that the arrest warrant was still active. One other factor the Appeals Court considered was that the officer's actions were not compliant the "the clear policy mandate of the Boston police department, set out in special order number 95-31, dated June 2, 1995, that 'immediately prior to arresting a person for an outstanding warrant officers shall notify Operations so that

the computerized Warrant Management System can be checked to determine if the outstanding warrant is still active." Based on all these facts, the Appeals Court upheld the denial of the motion to suppress.

An Act for Missing Persons Law (M.G.L. c. 22A)

"***An Act Relative to Missing Persons***" of Chapter 489 of the Acts of 2014 was enacted on January 7, 2015, and became effective on August 1, 2015.

Summary of the New Law: The new law adds some additional protocols for information that police departments enter into the missing person's data base through the Department of Criminal Justice Information Systems (hereinafter referred to as "DCJIS"). Aside from the protocols, it requires police to add some additional details related to missing children in order to be in compliance with the Federal statute **42 USC § 5780.** The law clarifies that the information is not considered public record and shall not be disclosed other than to broadcast information for missing persons. A task force will review the policies and procedures and advise as to whether additional trainings are necessary. There are some changes related to a medical examiner's role when remains are found. Below are some of the highlights are the new law:

Definition (G.L. c. 22C, § 1): The Act defines "AMBER alert plan" as the America's Missing Broadcast Emergency Response Alert Plan authorizing the broadcast media, upon notice from the department, to transmit an emergency alert to inform the public of a child abduction.

Amber Alert Protocols and Procedure: Each department shall establish and maintain an AMBER alert plan:

> (a) Police departments shall broadcast to the general public and law enforcement agencies information related to any child abducted under the age of 18 via the AMBER alert plan. Each department shall have protocols and procedures in place for the operation of the plan as well as educate and inform law enforcement agencies and the public of its availability.
>
> (b) If a law enforcement agency determines that a child has been abducted and that the circumstances of the abduction indicate that the child is in serious danger of bodily harm or death, the agency shall obtain descriptive information for the AMBER alert plan and provide the descriptive information to the department. Thereafter, the law enforcement agency shall identify a point of contact within the agency capable of providing regular updates to the department about the abduction.
>
> (c) The law enforcement agency reporting the abducted child shall obtain a picture of the child.
>
> (d) The department may activate an AMBER alert plan, upon a determination that the following criteria have been met: (i) a child has been abducted; (ii) the child is in danger of serious bodily harm or death; and (iii) sufficient information exists to believe that activation of an AMBER alert plan may help locate the child.

(e) The department may notify appropriate state agencies and authorities, including, the Massachusetts Department of Transportation, Massachusetts emergency management agency, the state lottery commission, the Massachusetts Bay Transportation Authority and the Massachusetts Port Authority of the activation of the AMBER alert plan.

Records are not for disclosure: All material broadcasted or maintained pursuant to an emergency alert are not considered public record and are not in the custody of the department or other state agencies or authorities. None of this information shall be disclosed.

The Department of Criminal Justice Information Systems (hereinafter referred to as "DCJIS" must maintain a statewide central register containing all necessary and available identifying information of a missing child." This "central register" must be established by **August 1, 2015, and now must allow** for the entry of specific data that is enumerated in the new statute.

Information Police Departments should enter into NCIC:

Police Departments must comply with Federal law (42 USC Section 5780) with regard to children that are missing. There is a requirement that specific data which must be entered into the state and NCIC Missing Person files, within 2 hours of report receipt, and that Missing Person records be updated within 60 days to include all additional data obtained on the missing individual, including medical and dental records, if available. The FBI automatically sends a $.K. message to the entering agency 60 days after the date of entry, reminding them to review the record and to add any additional info that may have become available.

The new law states that missing person records may contain the following information:

(i) the missing child's identifying marks;
(ii) prosthetics;
(iii) a photograph;
(iv) a description of the missing child's clothing;
(v) items that might be with the missing child;
(vi) reasons why the reporting person believes that the child is missing;
(vii) circumstances that indicate the disappearance was involuntary
(viii) circumstances that indicate the missing child may be at risk of injury or death
(ix) the means of transportation of the missing person;
(x) the missing child's fingerprints; and (xi) the missing child's blood type."

A photograph of a child must be obtained if a police department believes that a child has been abducted and that he/she may be "in serious danger of bodily harm or death."

Information that DCJIS will maintain:

DCJIS will maintain the missing person information. The Missing Person (hereinafter referred to as "MP") functionality that exists in the CJIS Messenger client allows for the entry of all the data required by the statute, so no modifications will be necessary. The data for which there is an actual corresponding MP File field is as follows:

Name	Height	Date of Last Contact	Fingerprint Classification
DOB	Weight	Missing Category	Blood Type
Sex	Eye Color	Identifying Marks	Prosthetics and Surgical Implants
Race	Hair Color	Dental Characteristics	Persons with Information

The NCIC Image File can also store the photograph of the missing child although it is not technically not part of the MP file. Additional information can also be entered but it does not have a corresponding MP File field, but can be recorded in the MIS field:

i. Location of the last known contact with the child

ii. Description of the missing child's clothing

iii. Items that might be with the missing child

iv. Reason(s) why the reporting party believes that the child is missing

v. The circumstances that indicate the disappearance was involuntary

vi. Circumstances that indicate the child may be at risk of injury or death

vii. The means of transportation of the missing person
(IMPORTANT: CJIS Messenger does allow for the entry of Vehicle and Registration information; these fields should be utilized if vehicle registration data is available)

The above information was rolled out from CJIS and if you have additional information regarding the procedure for completing the CJIS Missing Persons File, please contact the CJIS Support Services Unit via phone at 617.660.4710 or via email at cjis.support@state.ma.us.

Entering Information: Every department must enter all information required by the United States Department of Justice on said child into the National Crime Information Center of the United States Department of Justice. The AMBER alert remains active colonel of State Police directs it to be terminated.

NOTE: The AMBER alert plan shall not be activated for children considered to be runaways or incidents involving child custody disputes, except in cases of abduction if a threat of serious bodily harm or death exists against the child.

Training: Police Departments and 911 must establish training guidelines for 911 call takers and dispatchers on the AMBER alert plan.

Task Force: A task force will review and recommend policies and procedures for law enforcement in missing person cases. The task force shall be comprised of the secretary of public safety and security or a designee, who shall chair the task force, the colonel of state police or a designee, the commissioner of children and families or a designee, the chair of the board of the committee for public counsel services or a designee, a representative of the Massachusetts District Attorneys Association, a representative of the Massachusetts Chiefs of Police Association Incorporated and 2 persons to be appointed by the governor, 1 of whom

shall be a family member of a missing person and 1 shall be a person with experience in the social, economic and public safety impacts of missing person cases.

The task force shall identify and review federal laws, General Laws, regulations, policies and procedures mandating or guiding the receipt, processing and investigation of missing person's reports by law enforcement agencies in the commonwealth, including persons under 18 years of age and persons who have been abducted. The task force shall identify, for the preceding 10 calendar years: (i) the number of missing person cases reported to law enforcement agencies; (ii) the number of investigations begun and the number of investigations still open after 30 days; and (iii) the number of instances when the person reported missing is under 18 years of age.

Chapter 4

ADDENDUM

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT
John Adams Courthouse
One Pemberton Square, Floor 1M
Boston, Massachusetts 02108
617-878-0203

Paula Carey
Chief Justice of the Trial Court

Harry Spence
Court Administrator

MEMORANDUM

TO: Trial Court Judges
Clerk of Courts
Clerk Magistrates
Registers
Commissioner of Probation

FROM: Hon. Paula Carey, Chief Justice of the Trial Court
Harry Spence, Court Administrator

DATE: October 29, 2014

RE: Frequently Asked Questions Regarding An Act Relative to Domestic Violence

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The frequently asked questions and answers set forth herein represent a compilation of efforts across the Trial Court to identify issues arising from the implementation of An Act Relative to Domestic Violence. This document constitutes an attempt to provide practical guidance on a new law. In areas that lack clear consensus, your feedback would be welcome in our on-going efforts to address these questions. Please direct any questions and feedback to Sarah Ellis, Deputy General Counsel, Administrative Office of the District Court, (617) 788-8812 or at sarah.ellis@jud.state.ma.us.

A. Different Definitions of Abuse

1. Do different sections of the law use different definitions of domestic abuse and apply to different categories of alleged offenses?

- Answer: Yes. The following definitions apply to the following areas of the law:

a. **Six Hour Waiting Period for Clerks to Set Bail**: **Applies to adult intimate partners and family members**. Clerks and persons authorized to take bail must wait six hours after arrest to admit to bail defendants charged with "any act that would constitute abuse, as defined in G.L. c. 209A, § 1". G.L. c. 276, § 42A, §57, §58. General Laws c. 209A, § 1 defines abuse as occurring between "family or household members," which are persons who (a) are or were married to one another; (b) are or were residing together in the same household; (c) are or were related by blood or marriage; (d) having a child in common regardless of whether they ever married or lived together; (e) are or have been in a substantive dating or engagement relationship.

b. **Three Hour Waiting Period for Arraignment**: **Applies to defendants charged with three crimes only**. The Commonwealth is the only party permitted to move for arraignment within three hours of the complaint being signed in cases charging Violations of Restraining Orders, Domestic Assault and Battery under G.L. c. 265, § 13M, and Strangulation under G.L. c. 265, § 15D. G.L. c. 276, § 42A, § 57, § 58.

c. **Judicial Inquiry of Abuse of G.L. c. 276, § 56A**: **Applies to all victim crimes**. "Before a judge of the superior court, district court or Boston municipal court releases, discharges or admits to bail any person arrested and charged with a crime against the person property of another, the judicial officer shall inquire". G.L. c. 276, § 56A.

d. **Prosecution's allegation of abuse and judicial findings under G.L. c. 276, § 56A**: **Applies to intimate partners and family members**. Specifically, "the judicial officer shall inquire of the commonwealth as to whether abuse, as defined in G.L. c. 209A, § 1 is alleged to have occurred immediately prior to or in conjunction with the crime". G.L. c. 276, § 56A.

e. **Domestic Assault and Battery**: **Applies to intimate partners**. "For the purposes of this section 'family or household member' shall mean persons who (i) are or were married to one another; (ii) have a child in common regardless of whether they have ever married or lived together or (iii) are or have been in a substantive dating or engagement relationship". G.L. c. 265, § 13M.

f. **Strangulation**: **Applies to anyone**. "Whoever strangles or suffocates another person". G.L. c. 265, § 15D.

B. Six Hour Waiting Period for Out-of-Court Bails

1. Clerks and persons authorized to take bail are required to wait six hours prior to admitting to bail individuals charged with crimes alleging domestic abuse. When do the six hours begin?
   - Answer: The six hours begin at arrest. Clerks should rely on the time of arrest documented by the arresting police department.

Doesn't apply to all offenses

2. What criminal acts qualify for the six hour waiting period?
   - Answer: The six hour period applies to the two new crimes (Domestic A&B and Strangulation) and "any act that would constitute abuse" under G.L. c. 209A, § 1. General Laws c. 209A, § 1 defines abuse as the occurrence of one or more of the following acts between family or household members: (a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; (c) causing another to engage involuntarily in sexual relations by force, threat, or duress.
3. Does the six hour waiting period apply to juveniles?
   - Answer: No, juveniles are exempt from the six hour waiting period. The law states, "a person arrested, who has attained the age of 18 years, shall not be admitted to bail sooner than 6 hours after arrest." G.L. c. 276, § 42A, § 57, § 58.
4. Must the clerk or person authorized to take bail wait until the six hour window has passed to set bail, or can the clerk set a bail earlier to take effect when the six hours have expired?
   - Answer: The clerk is advised not to set a bail, execute recognizance, or receive the bail payment in any case alleging abuse as defined in G.L. c. 209A, § 1 until six hours after arrest have passed. The purpose of the law is to provide the clerk with a window of time to collect any information necessary to render a bail determination, as well as to provide the victim with an opportunity to safety plan. Logistical conversations between the person authorized to take bail and the police departments likely will occur prior to six hours, but no qualifying defendant should be admitted to bail prior to six hours.
5. Do clerks have to be at the police station to receive bail at the six hour mark?
   - Answer: No. A person cannot be admitted to bail prior to six hours, but that does not preclude the clerk from arriving at the police station a reasonable time after the six hours to set and receive bail. "[P]art of the responsibility of a bail commissioner is, as rule 14 provides, 'to respond with all reasonable promptness to calls for their services.'" *Commonwealth v. King*, 429 Mass. 169, 175 (1999), citing *Commonwealth v. Hampe*, 419 Mass 514, 519 (1995). While it has been determined by the Supreme Judicial Court that bail hearings should be held roughly within six hours of booking, *King*, 429 Mass. at 175, citing *Commonwealth v. Chistolini*, 422 Mass. 854, 856 (1996), the prohibition against admitting to bail defendants charged with crimes of domestic abuse sooner than six hours after arrest places an obligation on clerks to prompt and reasonable arrival after the six hours have expired. "The definition of promptness has not been precisely defined, and 'neither the Federal or State Constitution[], the bail statute, G. L. c. 276, §§ 57-58, Rule 14 of the Rules Governing Persons Authorized to Take Bail (1996), nor our case law establish a fixed time period

within which a bail hearing must be held.'" *King*, 429 Mass. at 175, citing *Commonwealth v. Falco,* 43 Mass. App. Ct. 253, 255 (1997).

6. In a court where there is no judge sitting, can a clerk sitting in the court session set bail on a domestic abuse case sooner than six hours after arrest?
   - Answer: No. The law says specifically that qualifying defendants, "shall not be admitted to bail sooner than 6 hours after arrest, except by a judge in open court." G.L. c. 276, § 42A, § 57, § 58. Only judges in open court can set bail prior to six hours after arrest. If a defendant is brought to a court without a judge sitting, the clerk must wait until the six hours since arrest have elapsed to set a bail. Even if a clerk sets bail after the six hours have expired, the defendant will need to be scheduled for arraignment before a judge.
7. If a defendant violates conditions of release set by a clerk or bail commissioner out-of-court, is there a right of arrest for the violation of pretrial release conditions?
   - Answer: Yes. A clerk can issue an arrest warrant revoking the defendant's bail for violation of the conditions of release.

     Bail conditions set by a bail commissioner or clerk stand in the same position as bail conditions set by a judge. The District Court has the power to issue arrest warrants "for the apprehension of persons charged with crime." G.L. c. 218, § 32. This power rests upon judges, clerks, assistant clerks, temporary clerks, and assistant temporary clerks. G.L. c. 218, § 33.

     There is no constitutional right to release on bail prior to trial; that right is solely a creation of statute. *Querubin v. Commonwealth*, 440 Mass. 108, 113-14 (2003). The right to bail in most cases is established by G.L. c. 276, § 58, which also permits the court or bail commissioner to make that bail dependent on compliance with stated conditions. Accordingly, "the liberty interest of a person admitted to bail is conditional; if the person violates the explicit condition of his release, then his liberty can be curtailed." *Paquette v. Commonwealth*, 440 Mass. 121, 126 (2003). A "court has inherent power to revoke a defendant's bail for break of any condition of release." *Id.* at 128.

     The statutory scheme sets forth a comprehensive system for adjudicating the question whether, after a person alleged to have violated a condition of release is brought to court, he should be released on the old conditions, have new conditions set, or be detained. G.L. c. 276, § 58B. Nothing in this statute limits the court's inherent authority to order the detention of the defendant between the time of the alleged violation and the judicial determination whether the defendant has violated a condition. To the contrary, G.L. c. 276, § 58B specifically *requires* the detention of the defendant during any continuance of this determination absent a finding that the public's safety can be reasonably assured and that the defendant will abide by conditions on release in meantime. Accordingly, the court retains

the inherent authority to order the arrest of a defendant upon the receipt of credible information that the defendant has violated the conditions of his release.

There can be no constitutional objection to the judicial authorization of an arrest and brief detention until the next court date. "A defendant cannot be heard to complain that his constitutional right to liberty has been violated when continued freedom was entirety within his own control, and the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct to the laws of this Commonwealth and to the explicit condition of his earlier release." *Paquette*, 440 Mass. at 129. Especially where the alleged violation of conditions will be adjudicated with the full procedural protections of G.L. c. 276, § 58B beginning at the next court date, the judicial discretionary decision to order arrest is well within the constitutional options available to the court.

Finally, this conclusion accords with similar areas of the law. For example, the statutory scheme plainly contemplates the issuance of arrest warrants after bail has been set, as G.L. c. 218, § 34 states the requirements for dispensing with the issuance of an arrest warrant for a person "admitted to bail." Similarly, Mass. R. Crim. P. 31(b) authorizes a court to issue an arrest warrant when necessary to assure a defendant's appearance on a motion to revoke a stay of execution of sentence. Reporter's Notes. By contrast, G.L. c. 276, § 24, which requires the issuance of a summons unless "there is reason to believe that the defendant will not appear upon summons" is, by its own terms, limited to the moment of complaint or indictment. *See Commonwealth v. Gorman*, 288 Mass. 294, 299 (1934) (explaining that the purpose of this statute was to replace the common law that a criminal case could be commenced only by arrest).

The police department that learns of the alleged violation must contact the on-call clerk. If the clerk decides to issue a warrant, and the clerk does not have access to Masscourts, a temporary paper warrant should be issued.

8. Does the six hour waiting period apply to domestic abuse defendants arrested on default warrants after arraignment?
   - Answer: An Act Relative to Domestic Violence did not alter the requirement of G.L. c. 276, § 29 that, "[a] person arrested on a default warrant for a felony or a misdemeanor punishable by imprisonment for more than one hundred days may be released on bail or recognizance only by a justice of the court having jurisdiction over the place where the person was arrested or is being held, or by a justice of the court that issued the warrant."
9. If a defendant is arrested on a straight warrant out of a different jurisdiction, how should the police or bail commissioner know if a charge is domestic abuse related when the arrest is made?

- Answer: The person authorized to take bail should request to review the police report supporting the charged offense(s) in the warrant prior to making any bail determination. This request should be made even if the arrest happens in a different jurisdiction than the warrant application. The person authorized to take bail should ask the arresting police department for assistance in obtaining reports from the jurisdiction out of which the warrant was issued. If the allegations qualify as abuse under G.L. c. 209A, § 1, then the bail commissioner should wait six hours to set a bail.

  If the straight warrant arises from a private complaint, police departments may not have information about the complaint. Eventually, when applications for complaint are scanned into Masscourts, and once after-hours Masscourts access is developed for clerks who take bail, any straight warrants issued based on private complaints will be accessible through view only access. Temporary warrants issued after court hours or probation warrants issued under G.L. c. 279, § 3 will not appear in the Masscourts database until such documentation is entered into the Masscourts system.

10. If a defendant charged with a crime of domestic abuse is moved from a police station to a regional lock-up in a different jurisdiction within the six hours, which bail commissioner or clerk should admit the defendant to bail?
    - Answer: The clerk or bail commissioner assigned to the jurisdiction where the defendant is held at the six hour mark will be the person to set and receive bail. *Rules Governing Persons Authorized to Admit to Bail Out of Court*, Rule 11 states, "the jurisdiction of maters in chancery and justices of the peace to admit a person to bail shall be limited to the county or judicial district, respectively, to which they are appointed. They may admit to bail any person held within their county or judicial district even when such person is held on charges outside of that county or judicial district."

C. Three Hour Delay for Court Arraignments

1. The Commonwealth is the only party that can move for arraignment on certain charges within three hours. When do the three hours begin?
    - Answer: The three hours begin when the complaint is signed by a magistrate or a magistrate's designee.
2. Does the three hour window apply to all defendants charged with crimes constituting domestic abuse?
    - Answer: No. It only applies to defendants charged with Domestic A&B under G.L. c. 265, § 13M, Strangulation under G.L. c. 265, § 15D, or Violation of a Restraining Order.
3. When a defendant charged with Domestic A&B, Strangulation, or VRO is brought to the courthouse after 2:30 p.m., and the Commonwealth refuses to move for arraignment prior to the end of court hours, what should the judge do?

- Answer: Judges are advised to inquire of the Commonwealth on the record as to the reasons why they are declining to move for arraignment. Judges are strongly cautioned against arraigning qualifying defendants within the three hour window over the objection of the Commonwealth.

  Practically speaking, this provision of the law will only apply to arrests that occur approximately between 10 a.m. and 2 p.m. for three crimes. A first justice may meet with District Attorneys, the defense bar, the police, clerk and probation in his or her court to encourage a practice of communication and immediate information gathering between parties for this category of cases. If the prosecution is gathering documents and communicating with the victim while the defendant is being booked, and defense counsel is notified during this time to appear in court, there is an increased likelihood that the Commonwealth will move for arraignment before the end of court hours. If the clerk is made aware during court hours of a defendant under arrest who the Commonwealth intends, upon arraignment, to move to detain pursuant to G.L. c. 276, § 58A, then coordinated efforts should be made to bring the defendant to the courthouse and conduct the arraignment before the close of court.

  - Holding the defendant without bail until next court sitting. The judge makes a record indicating that the Commonwealth has declined to move for arraignment, and then the judge inquires of the Commonwealth and places the Commonwealth's reasons on the record. The judge states that the three hours have not elapsed, and the judge orders the defendant held without bail until the next sitting of the court. It is expected this issue will be appealed by the defendant on due process grounds, and a ruling by the appellate courts would provide direction on how to interpret this provision of the law.
  - Scheduling arraignment for the next court session and setting a bail. While judges in the Supreme Judicial Court, superior court, and district court may admit prisoners to bail pursuant to G.L. c. 276, § 57, if the Commonwealth is not moving for arraignment because they are awaiting receipt of information that could bear on a bail determination, judges are strongly cautioned against setting a bail over the Commonwealth's objection.
  - Extending court hours is discouraged. There are safety and security considerations if a judge chooses to keep a court open beyond court hours for a specific case.
  - Judges should not return the defendant, without arraignment, to police custody. Once a defendant has been brought to a courthouse and is in the custody of the court officers, he or she should not be returned to police custody without having been arraigned.

4. Can courts set different cut-off times for defendants in custody for Domestic A&B, Strangulation, and VRO's?
   - Answer: Courts should not set different cut-off times for defendants charged with Domestic A&B, Strangulation or Violations of Restraining Order, but instead, as with all cases, communication should occur locally between police departments and court personnel, such as clerks, to coordinate the transportation and receiving of afternoon prisoners. We continue to examine the impact of the three hour waiting period on the ability to receive and arraign defendants in afternoon court sessions.

D. Bail Revocation

1. Should the bail warning be changed from 60 days to 90 days?
   - Answer: Yes. The defendant's bail can be revoked for 90 days regardless of the bail statute under which his bail and / or conditional release was set. While the Commonwealth may still move for a 60 day revocation, the defendant should be advised of the worst case scenario.
2. When is the defendant's bail revoked for 60 days and when is the defendant revoked for 90 days?
   - Answer: The 90 day revocation can apply regardless of the bail statute under which the defendant's bail and / or conditional release was set. The defendant can be revoked for 90 days under G.L. c. 276, § 58B for either committing a new crime while on release, or for a violation of pretrial conditions of release. Additionally, if there is probable cause that the defendant committed a new crime, under G.L. c. 276, § 58B there is a rebuttable presumption in favor of the 90 day detention.

     An Act Relative to Domestic Violence did not alter G.L. c. 276, § 58, ¶ 3, which is the 60 day bail revocation provision. Sixty day revocation under G.L. c. 276, § 58, ¶ 3 allows for revocation based on a new crime, but it does not apply to a violation of conditions of release (other than committing a new crime). Therefore, when a defendant commits a new offense while on bail or pretrial conditional release, both 60 day revocation and 90 day revocation exist as options.

E. Allegation of Abuse under G.L. c. 276, § 56A

1. Must the court inquire as to whether abuse is alleged in all victim cases?
   - Answer: Yes, G.L. c. 276, § 56A applies to all crimes against the person or property of another, not only cases charging domestic violence.
2. What should the judge review in making a ruling as to whether abuse is alleged?
   - Answer: The judge must make a written ruling determining if abuse has been alleged "to have occurred immediately prior to or in conjunction with the crime for which the person was arrested and charged." The purpose of the G.L. c. 276,

§ 56A allegation is to signify whether a case contains a domestic abuse allegation, even if the case does not so appear on the face of the charges. Judges should review the Commonwealth's allegation. In addition, police reports relating to the charged offense(s) or a statement of the case by the prosecution may provide useful information for the judicial ruling. Review of past reports and information relating to past cases may provide context for a G.L. c. 276, § 56A finding, but will more often relate to bail determinations.

3. If an ADA files a G.L. c. 276, § 56A form alleging abuse, should the judge ask for a recitation of the facts prior to making the judicial determination that abuse has been alleged?
   - Answer: While it is not required, if a judge would find a recitation helpful for receiving information about the underlying events to determine whether abuse is alleged, it is appropriate to request a recitation.
4. If an ADA does not allege abuse under G.L. c. 276, § 56A, does the form still need to be filled out?
   - Answer: No, the form needs to be completed and filed only when the Commonwealth alleges abuse. The judge's inquiry as to whether abuse is alleged will now be captured by a check box on the docket sheet.
5. What is the procedure for handling the G.L. c. 276, § 56A form?
   - Answer: The clerk should keep the original form, docket the filing on the paper docket sheet, enter the correct docket code in Masscourts, and impound the form. This will fulfill the clerk's obligations under G.L. c. 218, § 12 to keep a record of court proceedings and to keep care and custody of all records and papers appertaining to, or filed or deposited in, their respective offices. The clerk no longer needs to provide a copy of the G.L. c. 276, § 56A form to probation. Instead, when the clerk makes the electronic docket entry in Masscourts signifying that an allegation was made pursuant to G.L. c. 276, § 56A, the docket code will trigger a flag on the defendant's CARI record. This will be a streamlined procedure to provide required G.L. c. 276, § 56A information to probation.
6. Must the G.L. c. 276, § 56A docket entry that abuse was alleged be confidential?
   - Answer: No. General Law c. 276, § 56A states that "[s]uch preliminary written statement shall not be considered criminal offender record information or public records and shall not be open for public inspection." Impounding the G.L. c. 276, § 56A form that contains the Commonwealth's preliminary written statement alleging abuse will fulfill the requirements of the statute. As in court records regarding mental health, while reports to the court of mental health examinations and commitment papers are kept private under G.L. c. 123, § 36A, the statute specifically does not prevent "any notation in the ordinary docket of criminal

cases concerning commitment proceedings under [G.L. c. 123, §§ 1-18, inclusive] against a defendant in a criminal case." G.L. c. 123, § 36A.

7. Potential Changes to the § 56A form. Once procedures are finalized for filing and docketing § 56A forms, the form itself may be modified.

F. Confidentiality of Domestic Violence Police Reports

1. Should clerks impound police reports alleging domestic violence?
   - Answer: Police reports containing allegations of domestic violence are confidential when they are police records, but they are not confidential by operation of statute once they become court records. Police reports, when they are police department records, are confidential under G.L. c. 41, § 97D if they contain reports of rape, sexual assault, attempts to commit such offenses, and abuse perpetrated by family or household members under G.L. c. 209A, § 1. This means any act between family or household members attempting to cause or causing physical harm, placing another in fear of imminent serious physical harm, or causing another to engage involuntarily in sexual relations by force, threat, or duress.

     General Law c. 265, § 24C, which makes the names of sexual assault victims confidential in court records, was not amended by the law. District Court Standards of Judicial Practice, *The Complaint Procedure* § 5:03 (rev. 2008), provides that clerk-magistrates may, as appropriate, remind police departments and other parties that submit reports to the court that by law such reports, once filed, are usually accessible to the public. Such parties may be encouraged to redact superfluous sensitive or highly personal information from such reports before they are filed.

     When a motion to impound has been filed by a party, the motion to impound should be heard before any reports are released by the clerk to the public.

G. Retroactivity

1. Is the 120 day dangerousness detention retroactive?
   - Answer: If the Commonwealth moves for dangerousness after August 8, 2014, the defendant is subject to the 120 day detention, regardless of when the crime occurred.

H. Disseminating Information to Domestic Violence and 209A Defendants

1. How can courts comply with the requirements to provide information relative to domestic violence resources to defendants and victims on restraining orders and criminal domestic abuse cases when this information has not been promulgated or disseminated to the courts?

- Answer: The Trial Court has convened a committee with various victim service agencies, the Trial Court Domestic Violence Training Task Force, and other state agencies to create pamphlets / information sheets for each county that will satisfy the requirements of the statute. Budget requests are also being made relative to this requirement, which is "subject to appropriation."

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lieutenant Governor

The Commonwealth of Massachusetts

Executive Office of Health and Human Services
Department of Public Health
Bureau of Health Care Safety and Quality
Medical Use of Marijuana Program
99 Chauncy Street, 11th Floor, Boston, MA 02111

MARYLOU SUDDERS
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Tel: 617-660-5370
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Circular Letter: DHCQ 15-08-637

TO: Registered Marijuana Dispensaries

FROM: Eric J. Sheehan, J.D., Interim Bureau Director, BHCSQ EJS

SUBJECT: Policy on Sale of Accessories at Registered Marijuana Dispensaries

DATE: August 17, 2015

Pursuant to 105 CMR 725.105(N)(7), (8), Registered Marijuana Dispensaries ("RMD") are permitted to sell the following accessories to qualifying patients or their personal caregivers to facilitate the medical use of marijuana:

- Vaporizers and attachments;
- Pipes and attachments;
- Water pipes and attachments;
- Rolling papers, including wired rolling papers;
- Concentrate Dabbers; and
- Such other devices used to facilitate the use of marijuana for medical purposes that are approved for sale by the Department upon request by a RMD.

Accessory products and packaging sold in RMDs should be consistent with the medical nature of the product and shall meet the packaging requirements in 105 CMR 725.105(E)(1), which requires marijuana to be packaged in plain, opaque, tamper-proof, and child-proof containers without depictions of the product, cartoons, or images other than the RMD's logo.

Accessory products and packaging shall adhere to the prohibitions in 105 CMR 725.105(L)(8) that advertising and marketing materials shall not contain:

- Any statement, design, representation, picture, or illustration that encourages or represents the use of marijuana for any purpose other than to treat a debilitating medical condition or related symptoms;
- Any statement, design, representation, picture, or illustration that encourages or represents the recreational use of marijuana;

CHARLES D. BAKER
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Circular Letter: DHCQ 15-08-638

TO: Registered Marijuana Dispensaries

FROM: Eric J. Sheehan, J.D., Interim Bureau Director, BHCSQ

SUBJECT: Amendment to the Protocol for Sampling and Analysis of Finished Medical Marijuana Products and Marijuana-Infused Products for Massachusetts Registered Medical Marijuana Dispensaries

DATE: August 17, 2015

The Medical Use of Marijuana Program has amended the document *"Protocol for Sampling and Analysis of Finished Medical Marijuana Products and Marijuana-Infused Products for Massachusetts Registered Medical Marijuana Dispensaries"* to reflect the addition of the hydrocarbon gases propane, butane and iso-butane to the list of approved solvents in Exhibit 7: Analysis Requirements for Residual Solvents in Cannabis Oil.

Solvent*	Upper Limit (mg/kg)
Propane (CAS 74-98-6)	1
n-Butane (CAS 106-97-8)	1
Iso-Butane (CAS 75-28-5)	1

*The ingredients must be of purity suitable for use in food intended for human consumption. At a minimum, the solvent (gas) must be high-purity (>99%) of propane, n-butane, or iso-butane, or a blend these three hydrocarbon gases.

The upper limits are based on the residual solvent recommendation by the Commission of the European Communities, Scientific Committee on Food (SCF, 1999). SCF has evaluated propane, n-butane and iso-butane as extraction solvents and determined that a residue level of